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IN THE

Supreme Court of the United States

OCTOBER TERM, 1964

No. 443

HUGHES TOOL COMPANY

and

RAYMOND M. HOLLIDAY, *Petitioners*,

v.

TRANS WORLD AIRLINES, INC., *Respondent*.

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF FOR PETITIONERS

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BRIEF FOR PETITIONERS

OPINIONS BELOW

The opinion of the Court of Appeals is reported at 332 F. 2d 602. (R. 1413)

The opinion of the District Court (A-132)[1] is reported at 32 F.R.D. 604. A prior opinion of the District Court, denying a motion by Hughes Tool Co. to dis-

[1] References to the record of the proceedings printed for the court below are designated "A" and refer to the "Appendix to Brief of Defendants-Appellants" filed in this case with the Court of Appeals, now volumes I & II of the record printed for this Court's use (vol. I contains pp. A-1 to A-470; vol. II; pp. A-471 to A-964). References designated "R" are to the material newly printed for this Court's use in this case and the companion case, No. 501 (vols. IV, V & VI). References to "f" are to unprinted portions of the original record.

miss the complaint (A-118), is reported at 214 F. Supp. 106.

JURISDICTION

The judgment of the Court of Appeals was entered on June 2, 1964. (R. 1438) The petition for a writ of certiorari was filed on August 31, 1964, and was granted on November 16, 1964. The jurisdiction of this Court rests upon 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED

1. Whether, by reason of the Federal Aviation Act, the jurisdiction of the District Court over the antitrust claims alleged in the complaint in the present case is superseded by the jurisdiction of the Civil Aeronautics Board?

2. Whether, by reason of orders issued by the Civil Aeronautics Board, the acts alleged in the complaint are exempt from the antitrust laws under Section 414 of the Federal Aviation Act?

3. Where the acquisition of control by a parent over its subsidiary may not be attacked under Section 7 of the Clayton Act, does a complaint by the subsidiary relating to the exercise of control by the parent over its subsidiary state a claim under the antitrust laws?

STATUTES INVOLVED

The pertinent provisions of the Federal Aviation Act, 72 Stat. 737 (1958), 49 U.S.C. §§ 1301 *et seq.*, the Sherman Act, 26 Stat. 209 (1890), 15 U.S.C. §§ 1 *et seq.*, and the Clayton Act, 38 Stat. 730 (1914), 15 U.S.C. §§ 12 *et seq.*, are set forth in the Appendix *infra*, pp. 1a-11a.

STATEMENT

I. SUMMARY STATEMENT OF THE CASE

In 1944 the Civil Aeronautics Board (Board) approved the ownership by Petitioner Hughes Tool Co. (Toolco) of approximately 45 per cent of the stock of Respondent Trans World Airlines, Inc. (TWA).[2] That approval was required under § 408 of the Federal Aviation Act (FAA) which prohibits the control of air carriers by certain sorts of interests without an order of approval from the Board. The order of approval contained a condition restricting commercial transactions between TWA and Toolco to items not exceeding $200 each and totaling not more than $10,000 per year, absent further Board approval. Toolco subsequently augmented its stockholdings in TWA, and in 1950, the Board approved Toolco's ownership of over 70 per cent of the TWA stock.[3]

Between 1944 and 1960, the Board issued a series of orders specifically authorizing every transaction between TWA and Toolco relating to the acquisition of aircraft or financing. (pp. 20-33, *infra*) These orders were issued as modifications of the 1944 Board order approving Toolco's acquisition of control over TWA.[4]

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[2] *Transcontinental & Western Air, Inc., Control by Hughes Tool Co.*, 6 C.A.B. 153 (1944).

Toolco is primarily engaged in the manufacture and sale of equipment to the oil drilling industry. TWA, one of the country's leading airlines, is engaged in providing both transcontinental and transatlantic scheduled air transportation.

See, n. 21, p. 21, *infra*, for the manner of referring to sections of the FAA and its predecessor statute.

[3] *Trans World Airlines, Inc., Further Control by Hughes Tool Co.*, 12 C.A.B. 192 (1950).

[4] Under FAA § 414, "Any person affected by any order made under Section 408 . . . is . . . relieved from the operation of the 'antitrust laws' . . . insofar as may be necessary to enable such person to do anything authorized, approved, or required by such order."

In December, 1960, TWA required substantial capital to finance the acquisition of jet powered aircraft. As a condition to making the loans, the insurance companies and banks insisted that the TWA stock owned by Toolco be placed in a Voting Trust (A-16, A-222-23). TWA's complaint alleges that the Voting Trustees, a majority of whom were designated by the lenders, "were empowered to exercise their sole and absolute discretion in respect of the TWA stock deposited with them and accordingly were authorized to elect directors who would be in control of TWA's management and policies." (A-16)

The present action was commenced on June 30, 1961—six months after the lender-management assumed control over TWA pursuant to the Voting Trust—by the filing of a Complaint by TWA against Toolco; Howard R. Hughes, Toolco's sole shareholder;[5] and Raymond M. Holliday, an officer and director of Toolco. Both Toolco and TWA are Delaware corporations, and the jurisdiction of the District Court was dependent on alleged violations of the antitrust laws.

The Pleadings

TWA's complaint alleges three "claims." The first is cast in conventional antitrust form. It specifies six areas of "trade and commerce" as involved in the action. Each one concerns the acquisition or financing of aircraft for TWA. (A-3-4) There follows a series of allegations purporting to define the relevant markets. These "markets" are all defined in terms of TWA's requirements for aircraft. Subparagraphs 8(e) and (f) are typical:

> "(e) The requirements of TWA for commercial jet-powered aircraft constitute and have consti-

[5] Hughes was never served with the summons and complaint in the action. He has not been an officer or director of Toolco since December, 1960.

tuted a separate and distinct market for United States aircraft manufacturers by reason, *inter alia,* of design and flight characteristic requirements, fleet and operating requirements, and the structure of the domestic and foreign routes of TWA."

"(f) TWA constitutes and has constituted a substantial proportion of the market for the various types of commercial aircraft made by United States aircraft manufacturers. . . ." (A-5-6)

As "Offenses Charged," the complaint proceeds to allege that the defendants engaged in:

1. A combination and conspiracy to restrain commerce, in violation of § 1 of the Sherman Act, "by providing financing of the acquisition by the plaintiff of aircraft, including jet-powered aircraft, only upon the condition that plaintiff acquire all such aircraft from defendant Toolco" and "by requiring plaintiff to boycott all suppliers of aircraft, including jet-powered aircraft, except defendant Toolco." (A-8)

2. A combination and conspiracy to monopolize and an attempted monopolization of "a substantial segment of the interstate and foreign trade and commerce of the United States" in violation of § 2 of the Sherman Act. (A-8-9)

3. Sales and leases of jet-powered aircraft on the condition that TWA not buy or lease the goods of competitors of Toolco, in violation of § 3 of the Clayton Act. (A-10)

4. Acquisition of the stock of TWA in violation of § 7 of the Clayton Act. (A-10)

It is charged that the defendants did various acts in furtherance of these offenses, with the intent, *inter alia*, that they "would seize control over TWA and its business;" that Toolco would "become the sole source of supply of jet-powered aircraft to TWA," and that

they would "have TWA as a captive market;" that suppliers of aircraft to TWA other than the defendants "would be boycotted and foreclosed" from the trade and commerce represented by TWA; and that the defendants would dictate the acquisition and financing of aircraft by TWA. (A-9-10)

The principal acts complained of by TWA are those allegedly committed by the defendants prior to December, 1960, when the Voting Trust was created at the insistence of the lenders. The acts alleged amount to no more than that Toolco acquired 78% of the stock of TWA and through this stock ownership either controlled, or sought to control, the acquisition of equipment and financing by TWA. Paragraph 24 summarizes these acts:

> "From 1955 until December, 1960, the defendants used their power over the financing of aircraft thus obtained to compel TWA to acquire aircraft of the type and in the manner dictated by the defendants and used their power over TWA's acquisition of aircraft, obtained as hereinbefore alleged, to compel TWA to obtain financing for the acquisition of such aircraft of the type and in the manner dictated by the defendants." (A-15)

The complaint then describes the creation of the Voting Trust to hold Toolco's stock in TWA at the mandate of "the financial institutions as a condition to making loans to TWA" for the purchase of jet aircraft; and the subsequent installation of a new management of TWA by the lender-controlled trustees. (A-17). The complaint then alleges that notwithstanding the installation of this new management, the defendants continued to seek to control TWA's aircraft acquisitions and financing.

Paragraph 48 summarizes these charges:

> "The stock of TWA acquired by defendant Toolco has thus been used by the defendants since December 31, 1960 in an effort to restrain, restrict and control TWA. Despite the existence of the Voting Trust, the defendants and Atlas[6] have attempted to require TWA to obtain aircraft exclusively from the defendants, to prevent TWA from obtaining aircraft essential to its business from Boeing, to prevent TWA from obtaining financing for the acquisition of such aircraft except on terms dictated by defendants, to require TWA to merge with another airline upon terms disadvantageous to TWA, to enlarge the defendants' indirect stock interest in TWA and to regain control over TWA and its entire business." (A-21)

The offenses are alleged to have had the effect of restraining and monopolizing competition among aircraft manufacturers and others in the furnishing of aircraft to TWA and other air carriers. (A-22)

The bulk of the asserted effects, however, involve alleged injuries to TWA's business in various particulars, such as terms of financing and time of delivery of aircraft. For example, Paragraph 50 charges injury to TWA:

> "by Toolco's acquisition of TWA's stock, in that TWA has been denied the right freely to acquire aircraft necessary to its operations and has received such aircraft as were made available to it in an untimely manner. TWA has further been immediately injured in its business by Toolco's denial to TWA of the authority or opportunity to acquire jet-powered aircraft from any person or corporation other than Toolco. . . ." (A-23)

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[6] Atlas Corporation, alleged to control Northeast Airlines, was named as a co-conspirator but not a defendant. See n. 7, p. 96, *infra*.

The second "claim" consists largely of a reallegation of the specifications of the first. It carves out the acts of the defendants since the creation of the Voting Trust as a separate combination and conspiracy to restrain commerce in violation of § 1 of the Sherman Act, a combination and conspiracy to monopolize and attempted monopolization in violation of § 2, and a use of TWA stock by Toolco in violation of § 7 of the Clayton Act. (A-25-27)

The third "claim", pleaded under a theory of pendent jurisdiction, alleges that the same acts of the defendants since the creation of the Voting Trust constitute a malicious injury to TWA's business at common law. (A-27)

Counsel for TWA summarized the complaint as follows:

> "The first claim of the complaint herein alleges combinations and conspiracies in violation of Sections 1 and 2 of the Sherman Act and violations of Section 3 and 7 of the Clayton Act. *The crux of such violations rests upon Toolco's acts and efforts, through the exercise of its stock control over TWA, to control and dictate the manner and method by which TWA acquired aircraft and the necessary financing therefor. . . .*" (f. 134; emphasis added)

and:

> "The complaint alleges that the private purposes of the defendants were and are so to control the acquisitions of aircraft by TWA as to make it their private prerogative to determine from whom, when, and with what financing arrangements TWA could buy the planes needed to keep it physically and financially off the ground, and thus to create a private market for themselves to the exclusion of all others." (A-279)

The complaint demands, *inter alia*, divestiture of Toolco's stock interest in TWA, treble damages for the alleged antitrust violations in the amount of 105 million dollars, and an injunction restraining the defendants from attempting to exercise control over TWA. (A-28-30)

The answers of Toolco (A-31) and Holliday (A-144) deny the alleged violations of law. They also plead that the District Court has no jurisdiction over the subject matter and that the complaint fails to state a claim on which relief can be granted for the reasons that:

(i) the Board has authorized and approved the acquisition and exercise of control by Toolco over TWA;

(ii) the Board has retained and exercised regulatory jurisdiction over all transactions between Toolco and TWA; and

(iii) the Board has specifically approved every transaction between Toolco and TWA involving the acquisition of flight equipment or financing, thereby exempting the conduct complained of from the antitrust laws.[7]

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[7] Toolco also filed six counterclaims against TWA, certain lending institutions, and certain individuals representing the interests of the lending institutions. These counterclaims allege, *inter alia*, that these additional defendants and TWA had conspired to deprive Toolco of control of TWA, were conspiring to restrain and monopolize the long-term financing of the major airlines of the United States in violation of §§ 1 and 2 of the Sherman Act, and had compelled Toolco to place its TWA stock in a lender-controlled voting trust, thereby engaging in violations of § 7 of the Clayton Act and § 408 of the Federal Aviation Act. (A-40-80) The District Court's dismissal of five of these counterclaims, affirmed by the Court of Appeals, is the subject of the companion case, *Hughes Tool Co.* v. *TWA et al.*, No. 501.

The District Court's Judgment

On February 6, 1963, the District Court denied Toolco's motion to dismiss the complaint (214 F. Supp. 106; A-98, A-118). The District Court then refused to certify the matters raised by the motion for interlocutory appeal. (28 U.S.C. § 1292(b)) Toolco elected to rest on its positions in order to obtain appellate review of decisions it deemed erroneous.[8] (A-130-31) As a result of Toolco's election, the District Court entered an order granting default judgment against Toolco pursuant to Rules 37(b)(2)(iii) and 37(d) of the Federal Rules of Civil Procedure. The Court referred the case to a Special Master to determine the amount of damages to be awarded TWA. The Court reserved for its own determination whether divestiture of Toolco's stock interest in TWA should be ordered (32 F.R.D., at 608; A-136).

At this point, the District Court certified the case for interlocutory appeal in advance of the probably "prolonged" hearing on damages because:

> "This order involves a controlling question of law (see *Pan American Airways, Inc.* v. *United States*, 371 U.S. 296 (1963)) as to which there is a substantial ground for difference of opinion." (32 F.R.D., at 608; A-137)

The Appeal to the Court of Appeals

The Court of Appeals granted interlocutory review of the District Court order, limited to two questions:

> "(1) Whether the U.S. District Court for the Southern District of New York had jurisdiction of the action, and

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[8] Cf. *United States* v. *Procter & Gamble Co.*, 356 U.S. 677, 680-81 (1958). Petitioner Holliday elected to be bound by Toolco's election. (A-136-37)

"(2) Whether the exercise of its regulatory power by the Civil Aeronautics Board in the premises by issuance of orders permitting defendants to act as defendants acted constitutes a good defense to the antitrust claim of [TWA] . . ."[9] (A-138)

The Court of Appeals affirmed the decision of the District Court on these questions, holding that:

(i) The District Court had jurisdiction under the antitrust laws over the acts charged in the complaint and could exercise that jurisdiction without regard to Board jurisdiction over the same acts;

(ii) The Board's approval of the transactions between Toolco and TWA which comprise the subject matter of this litigation did not afford Toolco a defense to the claims of TWA; and

(iii) The complaint stated a claim under the antitrust laws.[10]

II. THE HISTORY OF THE BOARD'S REGULATION OF THE TOOLCO-TWA RELATIONSHIP

Perhaps no control relationship in the Board's history has been subject to such continuous scrutiny and regulation as that between Toolco and TWA. The

[9] The Court of Appeals held that the propriety of the grant of default judgment in itself was not before it. (332 F. 2d, at 605; R. 1416)

[10] The Court held the complaint sufficient to state: "the outlines of a tying arrangement, an economic boycott of the defendants' competitors, and an attempt to monopolize commerce . . ." (332 F. 2d, at 611; R. 1427) The Court of Appeals apparently agreed with the holding of the District Court (214 F. Supp., at 109; A-123) that Toolco's acquisition of its stock interest in TWA was clearly authorized by the Board and the charges in this respect did not state a claim under § 7 of the Clayton Act.

original acquisition by Toolco of control of TWA, as well as the subsequent increase by Toolco of its stock interest, were approved by the Board only after a comprehensive review of all aspects of the relationship between the two companies, including its possible effects upon competition. Moreover, the entire course of dealings between Toolco and TWA for the past twenty years has been subject to Board supervision. Each transaction between them relating to the acquisition of aircraft and financing was authorized by the Board on the basis of applications making full disclosure of the pertinent details and showing that each transaction was justified and in the public interest.

A. Board Approval of Toolco's Control Over TWA

1. The acquisition by Toolco of approximately 45 per cent of the common stock of TWA—a controlling interest—was approved by the Board in 1944.[11] *Transcontinental & Western Air, Inc., Control by Hughes Tool Co.*, 6 C.A.B. 153 (1944). That approval was required under FAA § 408, which makes the acquisition of control of an air carrier by a person engaged in a "phase of aeronautics" unlawful, absent Board determination, after a hearing, that such control is "consistent with the public interest" and will not "result in creating a monopoly or monopolies and thereby restrain competition."

The Board held Toolco to be engaged in a "phase of aeronautics." (6 C.A.B., at 156) The basis for this

[11] Toolco commenced its acquisition of stock in TWA in 1939 at the request of the then president of TWA. (6 C.A.B., at 154) Much of the stock it purchased was newly-issued TWA shares, for the purpose of providing TWA with funds to finance acquisitions of Boeing aircraft. (R. 671; f. 20535)

holding was Toolco's participation in a program for the development of a commercial airplane—later called the "Constellation"—with a view toward its acquisition by TWA. In order to give TWA the benefit of Toolco's financial standing, Toolco placed, with Lockheed Aircraft Corporation, the original orders for Constellation aircraft. Toolco later assigned to TWA its contract rights to acquire the Constellations, but retained an option to buy 25 of them from TWA. In the Board's view, Toolco "may under its contracts, if it has not already, become a dealer in such equipment."[12] (6 C.A.B. at 155-56)

The Board granted approval of control only after a meticulous consideration of the potential competitive problems arising from Toolco's activities as a "dealer" in aircraft, and its relationship with TWA.[13]

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[12] It has never been suggested that Toolco was a general "dealer" in aircraft suitable for airline requirements. The "positions" taken by Toolco with respect to aircraft were solely with a view toward making the aircraft available to TWA—in other words, toward facilitating TWA's acquisition of aircraft.

The Board found:

> "The Constellation agreements were originally made by Hughes Tool with Lockheed for the benefit, and at the request, of TWA, and to evidence TWA's interest it was given the opportunity to be substituted for Hughes Tool as a direct contracting party. The obvious, if not the expressed, purpose of these arrangements was to give TWA the benefit of the credit and financial standing of Hughes Tool in a transaction involving substantial financial responsibility. As to the 25 airplanes subject to the option of Hughes Tool, the record indicates that these, if the option is exercised, will be held for resale and for experimental use." (6 C.A.B., at 155).

[13] The Board found: "So far as concerns the possibility of TWA's acquiring from the applicant aircraft which the applicant may purchase under existing agreements, the likelihood that TWA might be forced, through the control exercised by Hughes Tool, to purchase more than the economic operations of TWA require is

The Board's approval was subject to stringent conditions to "insure against any temptation which may later come to the applicant [Toolco] to take advantage of the relationship to its own profit and to the detriment of the public interest." (6 C.A.B., at 156) The order granting approval to the control relationship provided

> "That said approval shall be effective so long as commercial transactions between TWA and Hughes Tool Company . . . are limited to transactions involving complete items of property, the price of which does not exceed $200 each, with the further limitation that the total annual expenditure involved in such commercial transactions by either party shall not exceed $10,000." (6 C.A.B., at 158)

The Board incorporated this condition into its order "to protect the public interest from any improper coercion of the air carrier by a controlling company on account of any interest which that controlling company may have in some other phase of aeronautics." (6 C.A.B., at 157).[14] The Board also imposed a special

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remote, in view of what might be referred to as the paternalistic attitude which Hughes Tool has exhibited up to the present time. We find that the continuation of this relationship between the applicant and the air carrier would not be inconsistent with the public interest." (6 C.A.B., at 156).

[14] Under FAA § 408(b), the Board is authorized to approve the acquisition of control "upon such terms and conditions as it shall find to be just and reasonable and with such modifications as it may prescribe."

The Board rejected (6 C.A.B., at 157) the position of its Public Counsel that the Board approve control only on condition that its approval should terminate "in the event Hughes Tool or Hughes should engage in the manufacture, production, or disposition of aircraft or aircraft parts for use in interstate, overseas, or foreign

reporting requirement on TWA to insure compliance.[15]

2. In 1947, when TWA was in critical need of funds, Toolco agreed to loan 10 million dollars to TWA, on condition that TWA's board of directors be reconstituted, to make a majority Toolco's nominees. (12 C.A.B., at 206, 217) The loan agreement, in effect, gave Toolco an option to increase its stock ownership in TWA to more than 70 per cent. The Board, on its own initiative, instituted an investigation to determine whether the additional acquisition of control resulting from this agreement required new Board approval under FAA § 408. Order E-289 (R. 740-42).

The Board concluded that its approval was required and ordered a new hearing for that purpose. *Transcontinental & Western Air, Inc., Further Control by*

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air transportation, or in the event that Hughes should attempt to influence TWA with regard to the purchase, acceptance, or use by it of any aircraft or aircraft parts in the development or design of which he himself may have participated to a substantial degree." (6 C.A.B., at 157). Public Counsel said that these conditions would prohibit Toolco "from retaining control of TWA while engaging in those phases of aeronautics in which conflicts of interest involving TWA are most likely to arise." (R. 701)

The Department of Justice urged the Board to condition approval on the fact that Toolco was not then engaged in the manufacture of aircraft or parts for commercial use and reserve its jurisdiction in the proceeding for the purpose of reconsideration in the event that Toolco engaged in the manufacture of aircraft or aircraft parts in the future. (6 C.A.B., at 156-57; R. 663) In effect, as will be demonstrated, the Board retained that power without any express condition.

[15] TWA was required to furnish together with its annual report a statement of the total cash price involved in all commercial transactions between it and Toolco, the number of such transactions, the maximum and minimum price of items of property, and the nature of the commodities involved. (6 C.A.B., at 158)

Hughes Tool Co., 9 C.A.B. 381 (1948).[16] The Board order setting the hearing expressly recognized that under the agreement Toolco would acquire absolute control over TWA's acquisition of aircraft. Thus, the Board stressed that under the agreement "TWA was required to come to Toolco to obtain consent of the latter before purchasing additional equipment." (9 C.A.B., at 391 n. 18; see also *id.*, at 385)

At the public hearing which followed, an exhaustive inquiry was made into all aspects of the Toolco-TWA relationship, including the acquisition of aircraft by TWA from Toolco, and the financial assistance afforded TWA by Toolco.

At the Prehearing Conference Toolco and TWA took the position that the inquiry should "be limited to an examination of possible conflict between the aeronautical activities of Toolco and the increased measure of

[16] The Board ruled that with its 45 percent stock interest Toolco had "sufficient power to determine many but not all of the corporate activities of the carrier. It now has sufficient power and influence to control the board of directors of TWA and thereby manage and direct the usual day-to-day business and financial affairs of the airline." It pointed out, however, that for complete control, including power over such matters as mergers, consolidations, or dissolution, at least two-thirds stock interest would be necessary. (9 C.A.B., at 387). Under the new agreement, "a control relationship has been established where the controlled company, which formerly responded to orders from one person with assistance from others by proxies, or otherwise, now responds or may respond to one person at its sole instance." (9 C.A.B., at 391).

In ordering the hearing, the Board followed the recommendation of its Hearing Examiner who had concluded:

> "The acquisition or potential acquisition wholly at Toolco's option of a majority or two-thirds stock ownership in TWA creates in Toolco, alone, the power of change and of life and death over TWA." (A-267).

its control of TWA as an air carrier." (12 C.A.B., at 195). Public Counsel contended that the question whether the additional acquisition of control was in the public interest depended on "the application of the criteria set forth in [section 102] of the Act to the facts and circumstances respecting Toolco's actions and policies with regard to TWA in the matters of financing, management and related activities; and that in order to determine whether Toolco's increased measure of control is in the public interest it is pertinent to examine the manner of the general exercise of Toolco's control since the date of the Board's original approval thereof." (*Ibid.*)

The Examiner resolved the issue in favor of the broader inquiry, stating:

> "[I]t is clear that any acquisition of control sought to be approved under section 408 must be scrutinized in terms of the acquiror's actions and policies respecting the controlled carrier."
>
> "The Act envisages a broad concept of the public interest. An examination of the additional control relationship here involved in the light of [section 102] of the Act, which the Board has repeatedly found to be necessary in similar cases, requires an examination of the activities of the controlling corporation with respect to TWA for the period during which the prior approved control existed, Such an examination, it should be clear, should not be made for any other purpose at this time but to indicate the kind and character of control which might be forthcoming from the same controller exercising the additional degree of control arising from the transactions evidenced by the letter agreement of January 8, 1947." (R. 734)

He further explained in his Report to the Board:

> "the testing of the propriety of approving the acquisition requires a rather broad inquiry into the relationships between the controlling and the controlled companies." (12 C.A.B., at 196)

The Examiner stated that in material part he would develop the manner in which Toolco might be expected to exercise "complete, unqualified control" by an analysis of how Toolco had in fact exercised "the prior approved control." (12 C.A.B., at 196-97)

On July 10, 1950, the Board's Hearing Examiner filed a Report recommending Board approval of the additional acquisition of control.[17] The Examiner discussed in detail Toolco's "past actions and policies with respect to TWA in matters of financing, management and related activities," and his recommendation was based upon a consideration of Toolco's "plans and policies with respect to the controlled carrier," specifically including Toolco's program concerning financing by TWA and the acquisition of aircraft by TWA

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[17] The Examiner emphasized that "[c]omplete actual and legal control has been made certain under the additional acquisition" (12 C.A.B., at 197). In recommending approval, he stated: "TWA occupies a very important place in this country's domestic and international air transportation system. It is in the public interest to make and keep it a strong carrier to the end that it can continue effectively to serve the traveling public and effectively maintain its competitive position among our large carriers. . . . Accordingly, in the light of the record in this case and in recognition of the meaning of public interest as set forth in [§ 102] of the Act . . . the additional control acquired by Toolco . . . is consistent with the public interest." (12 C.A.B., at 223-24).

from Toolco, or with Toolco's assistance. (12 C.A.B., at 196).[18]

The Examiner, after his review of Toolco's assistance to TWA in selection and purchase of equipment, engineering and technical guidance, and financial support, reported that "The continued interest of Toolco in TWA appears essential to the best interest of the carrier and the public." (12 C.A.B., at 224)

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[18] The Examiner cited as important considerations in favor of approval "the contributions of Toolco and Mr. Hughes in the way of financial support to the carrier [and] in the selection and purchase of its equipment . . ." (12 C.A.B., at 216). He stated: "[Toolco's control] of TWA has been of substantial advantage not only to that carrier but to the industry as a whole. The beneficial nature of Toolco's control is demonstrated by the numerous instances of material and managerial assistance to TWA by Toolco and Mr. Hughes, particularly the manner in which Mr. Hughes and his company rallied to the support of the carrier during the financial crisis of late 1946 and early 1947." (12 C.A.B., at 223). "[The agreement of 1947] saved TWA from utter financial failure in the darkest hour of its history." (12 C.A.B., at 217)

The Examiner said: "TWA, with Toolco's aid, continued to expand its fleet of aircraft. The principal additions to its fleet in the years 1947 through 1949 were made possible through special credit arrangements with aircraft manufacturers and through borrowings from various banks. The record shows that this equipment could not have been obtained without the financial assistance of Toolco." (12 C.A.B., at 208).

The Examiner also commended Toolco for making possible the earlier development of the Constellation. "There is little doubt that the Constellation would not have been developed as early as it had without the aid of Mr. Hughes and his company. In addition to the technical assistance from Mr. Hughes and his engineers in Toolco the financial commitment which was necessary to undertake and continue the project could never have been made and met by TWA." (12 C.A.B., at 216) The Examiner pointed out that the acquisition of "practically every Constellation aircraft in the TWA fleet now and those on order has been accomplished directly or indirectly with the financial and technical assistance of Mr. Hughes and his company." (12 C.A.B., at 217).

In an opinion and order rendered October 6, 1950, the Board adopted *in toto* the findings, conclusions and recommended opinion of the Examiner approving the increased control of Toolco over TWA. *Trans World Airlines, Inc., Further Control by Hughes Tool Co.*, 12 C.A.B. 192. The Board concluded that

> "the record in this proceeding does not permit us to reach any other conclusion than that reached by the Examiner, viz, that the further acquisition of control should be approved as being consistent with the public interest and the requirements of the Act." (12 C.A.B., at 193).

The 1950 order approving the acquisition of further control continued in force the provisions of the 1944 order in which the Board retained jurisdiction over all significant transactions between Toolco and TWA. (12 C.A.B., at 193)

B. Board Approval of Transactions Between Toolco and TWA Involving the Acquisition of Aircraft and Financing

During the period prior to the creation of the Voting Trust—from 1944 to 1960—Toolco and TWA entered into a large number of transactions relating to the acquisition of aircraft by TWA and to the financing of the airline. Each of these transactions was approved by order of the Board.[19] Those orders and the applications of TWA reveal: (i) that the aircraft acquired by TWA with Toolco's assistance were acquired from four of the five suppliers of aircraft to air carriers in the post-war years, namely, Lockheed, Boeing, Martin and Convair; (ii) that in many in-

[19] During this period, TWA acquired certain aircraft directly from manufacturers, and also acquired certain aircraft without Toolco's participation in financing. See pp. 22, 23, 24, *infra*.

stances Toolco supplied financial assistance to TWA to acquire aircraft from others than Toolco; (iii) that Toolco's supplying of financial assistance to TWA, particularly by purchasing additional equity securities of TWA, was often dictated by the requirements of lending institutions; and (iv) that none of the aircraft acquired by TWA either pursuant to contracts made by Toolco with the manufacturer or otherwise were aircraft manufactured by Toolco (which has never manufactured commercial transport aircraft) but were manufactured by various established aircraft manufacturers.

Under the condition imposed by the Board in its 1944 order approving the control relationship, reaffirmed in 1950, each acquisition and lease of aircraft by TWA from Toolco, and each financing of TWA by Toolco, required specific Board approval. The various applications filed by TWA with the Board requesting such approval described in detail the nature of the transactions, the reasons for them, and their benefit to TWA. Extensive exhibits containing the terms and conditions of the transactions accompanied each application.[20] The orders issued by the Board approving the transactions were based upon FAA[21] § 408. All of the orders were issued in the form of modifications to the original control order (A-199-227); thus the Board deemed its transactional orders as continuations of the original two proceedings approving Toolco's acquisition of control and further control of TWA. Further, each of the modification orders rested upon a

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[20] Illustrative applications are contained in the Record at R. 241-74; R. 292-332.

[21] We thus refer not only to the Federal Aviation Act but to the identically-numbered sections of its predecessor, the Civil Aeronautics Act.

Board finding that the transaction was just and reasonable and in the public interest.[22]

The various transactional Board orders, discussed more fully below, relate to the acts which are alleged in the complaint to be antitrust violations. Thus, the Court of Appeals noted that "In 1959 and 1960 the Board issued five such modification orders approving the specific transactions involving the acquisition of jet aircraft which are the subject matter of this litigation" (332 F.2d, at 610; R. 1426).

1. Transactions between TWA and Toolco relating to propeller aircraft

A number of the Board orders approved transactions involving the acquisition from Toolco by TWA of propeller aircraft and the related financing.

(a) In the first of its applications to the Board, in 1948, for permission to purchase two Constellations from Toolco, TWA informed the Board that the price it would pay to Toolco was "substantially below" the price it had previously paid for airplanes of the same type by buying directly from Lockheed the year before. (R. 197)[23] One plane had been acquired by Toolco from the government and the other from Lockheed.

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[22] The Board also adopted the practice of making the modification orders subject to being "amended or revoked at any time in the discretion of the Board without hearing." (See, e.g., A-201)

[23] Illustrative of the comprehensive nature of the continuing control over Toolco-TWA affairs which the Board undertook to exercise is the following passage from a letter written by the Chief of the Carrier Relationships Section of the Board in initial response to this application:

> "... it is not felt that action can be taken on this motion without first obtaining additional information, such as the full history of the airplanes, including copies of the original bills of sale to Hughes Tool Company, a breakdown of the

(R. 197) This application was approved by the Board in Order E-2404, January 27, 1949. (A-177)

(b) TWA's second application, for approval of the acquisition of six Constellations from Toolco, stated:

> "[t]he contracts for the purchase of these airplanes were entered into directly by Hughes Tool Company to assist TWA in acquiring such airplanes. It is impossible for TWA to acquire aircraft without obtaining prior consents or waivers under various financial agreements it has entered into in the past. [agreements with a number of lending institutions, including Equitable Life Assurance Society.] . . . Because it would be necessary for TWA to obtain additional financing to acquire these six airplanes, TWA could not have entered into arrangements for their purchase without complying with or obtaining consents or waivers under . . . these agreements. By contracting to purchase these airplanes immediately Hughes Tool Company insured that they would be available to TWA upon the completion of the necessary clearances under these agreements." (R. 215)

TWA also pointed out that the terms on which Toolco was selling the aircraft were substantially better than those on twenty Constellations which TWA had previously contracted to buy directly from Lockheed. (R. 216).

Four of the aircraft proposed to be sold to TWA by Toolco were being acquired by Toolco from Air

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cost elements of each airplane, including the cost of each item of conversion the amount of depreciation accrued on each airplane, an appraisal of the planes at cost or market value, whichever is lower, by an impartial third party, a statement of the use made of the planes from the date they were purchased to the present date, including total number of flying hours, the total number of hours of use of each engine . . ." (R. 615)

France and two from Lockheed. This transaction was approved by the Board in Order E-4160, May 12, 1950. (A-179)

(c) The Board, by Order E-5234 entered April 25, 1951 (A-180), approved financing agreements between Toolco, TWA and Equitable by which TWA could obtain additional equity capital with the aid of Toolco. TWA informed the Board that the execution and performance of these agreements "will be of substantial benefit to TWA." The financing was in connection with aircraft to be purchased directly by TWA from Martin and Lockheed. (R. 243-47)

In the same Order, the Board approved the financing by Toolco on TWA's account of installments due on four Constellation aircraft purchased by Toolco from Lockheed. Again, the terms were more favorable to TWA than it could obtain elsewhere. (R. 244)

(d) The Board approved Toolco's sale to TWA of three Constellations, to be acquired by Toolco from Delta Air Lines, in Order E-8214, April 1, 1954. (A-183) TWA informed the Board that the terms were substantially the same as those in the 1950 transaction approved by the Board involving the sale of Constellations and, that, again, the financial arrangements were more favorable than TWA could obtain elsewhere. (R. 276-77)

(e) On May 17, 1956, the Board approved the exercise by TWA of options to purchase a total of 33 Constellation aircraft and related spare parts and engines from Lockheed through Toolco by Order E-10300. (A-185) In approving this transaction, the Board stated:

> "We have considered all of the circumstances surrounding the proposal and find it in the public

interest to relax the restrictions in the aforementioned Order No. 3210 [the original control order]. The Board has recently awarded TWA several new route segments and it appears that additional aircraft are required to implement such services. Furthermore, it appears that the new equipment is being made available to TWA at cost with the advantage of earlier delivery than would be possible if purchases of like equipment had to be made in the open market." (A-185).

(f) Under Order E-10871, entered December 18, 1956, the Board gave TWA permission to borrow up to $10,000,000 from Toolco on unsecured notes. The loan arrangement was to operate "as a standby credit to be utilized as and when required by TWA, thus providing it with reserve funds in the event additional cash is needed during the period of credit." (A-191). The Board found specifically: "The Board has previously approved the control of TWA by Toolco . . . under section 408 of the Act, and the proposed transaction raises no new question under section 408 of control by Toolco. The Board finds that the proposed transaction does not violate the original intent of the restrictions imposed upon transactions between TWA and Toolco. . . ." (A-191; see R. 336-41)

(g) On June 11, 1957, the Board approved a program to enable TWA to refinance its obligations under existing and contemplated contracts for the acquisition of the 33 Constellations approved the year before (Order E-11432, A-192). The program included: (1) issuance of new common stock by TWA and its acquisition by Toolco so as to net TWA at least $34,000,000; (2) equipment loans from banks or insurance companies of at least $35,000,000; (3) a revolving credit established by Toolco in favor of TWA of up

to $15,000,000. TWA informed the Board that this program would enable it to decrease its debt and the ratio of debt to equity, and leave it in "a much more flexible financial position for future financing of jet equipment and facilities." (A-192-193; see R. 342-57)

(h) On December 30, 1958, the Board issued Order E-13334 approving a transaction pursuant to which TWA was to sublease five aircraft from Toolco at the same rental as Toolco was paying the lessors. (A-196) In the same order the Board also approved, *inter alia*, the sale of spare parts at cost for such planes, a guarantee by Toolco at no cost to TWA of a $12,000,000 bank loan to TWA, and a guarantee by Toolco of TWA's payments under TWA contracts to buy aircraft directly from Lockheed. The Board pointed out that according to TWA's application:

> "[T]he aircraft and spare parts involved in these transactions are needed in the performance of its certificated services; that the terms under which TWA is receiving them involve the payment of no consideration to [Toolco] other than the rent incurred by [Toolco] in the case of the leased aircraft and reimbursement of [Toolco's] actual cost in the case of the L-1649A spare parts; and that the guarantees by [Toolco] of TWA's obligations were of substantial advantage to the carrier, were purely for TWA's convenience and entailed no cost whatever to TWA."[24] (A-197; see also R. 358-67)

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[24] The Board found in this order, as it had in the preceding order, that the transaction was within the intent of the original control order. (A-193-198)

2. Transactions of TWA and Toolco relating to jet aircraft

The period between 1955 and 1960 was a time of transition for the airline industry. During this time jet-powered aircraft were planned, produced, and introduced commercially. Toolco assisted TWA in making this transition, and the Board issued a series of orders, in the continuing control proceeding, approving transactions between TWA and Toolco relating to the acquisition and financing of jet aircraft.

(a) On May 10, 1956, TWA asked the Board to amend its order approving Toolco's control over TWA "so that the terms of such order will not restrict the right of TWA to purchase from Hughes Tool Company up to 25 jet powered aircraft suitable for operation by TWA on both its domestic and international routes." (R. 334) According to the application, Toolco was willing to manufacture these aircraft itself and commence delivery in 1961. Toolco's terms were to be as favorable as those of any other aircraft manufacturer, and it would sell the planes to TWA and other airlines at the same price. (R. 333-35)

On June 8, 1956, the Board, on its own initiative, ordered an investigation to determine whether the proposed entry of Toolco into the business of manufacturing jet aircraft would require further Board consideration under § 408 of the Toolco-TWA relationship and, if so, whether Board approval should be granted. (Order E-10360; A-189).[25]

The Board concluded that a § 408 investigation was necessary:

> "It appears, therefore, that the manufacture of jet aircraft for use of TWA and other airlines by

[25] The order of the Board noted that the original approvals of Toolco's control over TWA in 1944 and 1950 were based on findings that Toolco was not engaged in and had no plans to engage in the production of aircraft. (A-187)

Toolco may result in a substantial change in the activities of Toolco in the field of aeronautics which would require our further consideration, under section 408, of Toolco's control of TWA." (A-188)

The Board thus continued to exercise plenary jurisdiction over all aspects of the Toolco-TWA relationship.[26] The investigation was ultimately terminated in 1958 after Toolco abandoned the proposed manufacturing project. (Order E-12604; A-195)

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[26] In exercising this jurisdiction, the Board demonstrated that it was alert to any possible anti-competitive effects of Toolco's control of TWA and viewed its mandate under FAA § 408 in broad terms. After a prehearing conference in this matter, the Examiner reported:

"The public interest considerations in the foregoing issues are as follows:

1. What are the detriments to the public interest which may flow from the proposal herein?

a. Will the proposal result in restraints on competition?

(1) Will the proposal herein result in a restraint on competition by aircraft manufacturers because they will be unable to bid on equal terms with Toolco for the business of TWA?

(a) Is there any exclusive arrangement between TWA and Toolco whereby TWA may not use or buy jet aircraft from an aircraft manufacturer other than Toolco?

(2) Is there any restraint on competition between TWA and other air carriers?

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(3) Are the controlling stockholder and interlocking officials of Toolco and TWA subject to conflict of interests with respect to their obligations to TWA, Toolco, the minority stockholders of TWA and the public?

(a) Is there a danger that TWA may pay an excessive or unduly low price for the aircraft?

(b) Will TWA lose its freedom of choice in securing aircraft best suited for its present and proposed operations?" (R. 755-56)

(b) During 1959 and 1960, Toolco leased to TWA a large number of Boeing 707 and Convair 880 jet aircraft as an interim arrangement pending their acquisition by TWA as part of its own fleet of jet aircraft. These transactions were as follows:

(i) In Order E-13542, entered February 26, 1959, the Board approved TWA's day-to-day lease of one Boeing 707 from Toolco and TWA's acquisition of spare parts at Toolco's cost. (A-199) TWA informed the Board that use of the leased aircraft and spare parts was "necessary to enable it to carry forward its jet training program so that it will be in a position to conduct certificated jet service as soon as sufficient jet equipment is delivered to it." (A-200; see R. 368-77)

(ii) The Board gave TWA permission to lease from Toolco on substantially the same terms up to eleven Boeing 707's and to acquire spare parts in Order E-13873, dated May 15, 1959. (A-201) The leases were to expire no later than June 30, 1959. (A-205) TWA informed the Board that the aircraft and parts were necessary to carry forward its jet training program and commence service on its certificated routes.[27] (R. 378-82)

(iii) In Order E-14169, entered July 1, 1959, the Board granted TWA approval for an extension of up to

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[27] Illustrative of the Board's careful consideration of these applications was its deferral of action on a lease of up to 30 spare jet engines from Toolco to TWA because information concerning the terms thereof had not been developed in the filing with the Board. (A-203)

TWA subsequently notified the Board that it had purchased additional spare jet engines directly from the manufacturer to satisfy its interim requirements. (R. 386)

three months of the leases approved in the preceding order on the same terms. It also permitted TWA to lease four additional 707's from Toolco on identical terms and to purchase additional spare parts from Toolco at Toolco's cost. The reason for the extension was that "definitive financing arrangements permitting it [TWA] to operate these jet aircraft on a permanent basis . . . have not as yet been completed . . ." (A-205; see R. 383-89)

(iv) On September 30, 1959, the Board entered Order E-14504 granting TWA permission to extend the leases approved in the two preceding orders beyond the expiration date, on identical terms, until permanent financing could be completed. (A-207) This modification was also necessary because TWA had not yet completed definite financing plans for its jet aircraft program. (A-207; see R. 390-94)

(v) The Board approved the lease from Toolco by TWA of up to eight additional Boeing 707's and up to eight Convair 880's and the acquisition of spare parts at Toolco's cost in Order E-14877, dated January 29, 1960. (A-209; see R. 395-404)

(c) In the spring of 1960, TWA filed a series of motions for further modification of the original control order to permit its acquisition and financing of 25 Boeing 707's and 20 Convair 880's. (R. 405-25) Twenty of the Boeing 707's were already on lease to TWA from Toolco in accord with the prior Board orders and were to be sold to TWA. It was contemplated that Toolco would assign to TWA its interest and contract rights in the aircraft still in the process of manufacture on the condition that TWA would pay the balance of the purchase price to the manufacturer and pay to Toolco its cost with respect to such aircraft. (R. 415)

The total cost to TWA of these aircraft, together with engines, spare parts and equipment, was to be about $260,000,000. As the Board stated in its order approving these transactions, this sum was to be

> "raised by (1) the sale of $160,000,000 of senior securities (bonds), at 5½% interest, to banks and institutional investors, and (2) the sale of $100,000,000 of junior securities sold through a rights offering to TWA common stockholders. In the event that such stockholders do not subscribe to their pro rata share of the offering, Toolco will guarantee a net of $100,000,000 to TWA. In addition, Toolco has agreed to lend TWA an additional $50,000,000 to enable TWA to complete the financing plan and maintain its net working capital at not less than $10,000,000. Pending completion of these arrangements, TWA will borrow $50,000,000 from banks on a short term basis, such loan to be guaranteed by Toolco, and repaid from the proceeds of the permanent financing." (Order E-15430, June 23, 1960; A-212)

TWA informed the Board that acquisition of these aircraft was "necessary and desirable" for its operations and "that the terms of the financing program and the transactions with Toolco necessary to carry out these programs are reasonable and in TWA's best interest." (A-212-13)

In approving this transaction, the Board recognized the possibility that Toolco's interest in TWA would increase from 78% to approximately 90%. The Board order approved "the acquisition of the 45 aircraft and the proposed financing program, including the possible increased percentage of common stock held by Toolco in TWA" as "just and reasonable and . . . in the public interest." (A-213)

On July 21, 1960, in Order E-15561 (A-215), the Board sanctioned the purchase by TWA from Toolco of two additional Boeing aircraft and five jet engines. The Board also approved certain modifications in the financial arrangements which had been approved earlier, but which had not been consummated.[28] The Board pointed out that in its previous order it had before it for its consideration both TWA's program for acquisition of jet aircraft and its long-term financing program for the acquisition. (A-215) The substance of the transactions, it noted, remained the same. (A-216)

Pursuant to the plan approved by the Board's orders of June 23 and July 21, 1960, TWA had purchased 10 Boeing 707's and one Convair 880 aircraft by December, 1960. In the intervening period, however, the financing program had not been consummated because of the difficulty in reaching an agreement with the banks and insurance companies. The acquisition of these 11 jets by TWA had been facilitated through temporary debt financing by TWA, guaranteed by Toolco, and the issuance of subordinated obligations by TWA to Toolco. (R. 493)

On December 23, 1960, TWA asked the Board to approve an amended permanent financing program.

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[28] With respect to the transactions approved on June 23, 1960, and July 21, 1960, the Board also granted TWA an exemption from the provisions of § 408(a)(3) making it unlawful, except by Board order, for an air carrier "to purchase, lease, or contract to operate the properties, or any substantial part thereof, of any person engaged in any phase of aeronautics otherwise than as an air carrier." The Board found that enforcement of § 408 against TWA "would be an undue burden on TWA by reason of unusual circumstances affecting its operations and would not be in the public interest." (A-213, 217)

As the Board noted, "the basic terms of this financing including the portion involving transactions directly between Toolco and TWA are essentially the same as heretofore approved." (Order E-16195, December 29, 1960; A-225) The new financing program, however, contained a crucial difference. It provided "that as a condition precedent" to the obligation of the banks and insurance companies to purchase $165,000,000 worth of notes of TWA, Toolco would be required to place its 78% of the outstanding shares of TWA stock into a Voting Trust. This Voting Trust was to consist of three trustees, two of them to be designated by the lending institutions. (A-221-22; see R. 491-573)

Under its terms, the Voting Trust was to remain in effect for 10 years. Toolco had an option to terminate the Voting Trust earlier but only by purchase of all the TWA notes. Moreover, if Toolco sought to purchase the notes, it would be required to pay not only principal and accrued interest, but also an initial premium of 22% of the principal of the notes issued to the insurance companies—a premium of over $20,000,000. (A-222)

In modifying the Toolco-TWA control orders to permit the transactions with respect to aircraft acquisitions and financing between Toolco and TWA, the Board stated in its order of December 29, 1960:

> "We are advised that it was the insistence of the financial institutions upon the establishment and terms of the voting trust and of the conditions for its dissolution which have been the major stumbling block in recent weeks to the consummation of TWA's initial jet financing program." (A-223)

* * * *

These various Board orders reflect the continuous supervision by the Board of every material aspect of the control relationship between Toolco and TWA. They also reflect the history of how, through the exercise of that control by Toolco, as approved by the Board, Toolco rescued TWA from financial disaster after World War II, developed TWA's air fleet, aided it in becoming one of the most important air carriers in the country, and assisted it in entering the jet age. As the complaint itself demonstrates, it was only when Toolco's future plans for TWA clashed with the interests of the lending institutions that the present controversy arose. (See complaint, paras. 35-48; A-17-21) It was then, shortly after the lenders demanded that Toolco's majority ownership interest in TWA be stripped of its voting power through the imposition of a Voting Trust, and shortly after the installation of the lender-management which ensued upon the imposition of the Voting Trust, that the present complaint of TWA against its majority stockholder was filed.

SUMMARY OF ARGUMENT

I. By reason of the Civil Aeronautics Board's regulatory powers under the Federal Aviation Act, the antitrust laws are not applicable to the acts charged as antitrust violations in TWA's complaint. This Court recently analyzed the regulatory regime of the Civil Aeronautics Board in the *Panagra* case (*Pan American World Airways, Inc.* v. *United States*, 371 U.S. 296 (1963)). The Court there pointed out that where the Board has been vested by Congress with broad regulatory powers to take a matter in hand, and to deal with it from the point of view of the competitive standard clearly delineated by the Act, the antitrust laws do not apply to facts comprising the "pre-

cise ingredients" of a case subject to the Board's powers. The question, in each case of supersession of the antitrust laws by the Board's powers, depends on the particular details of the antitrust violations charged and the specifics of the Board's regulatory tools.

In the present case, the antitrust charges center upon the relationship between Toolco, a corporation "engaged in a phase of aeronautics," and TWA, a regulated air carrier. The dominant facts of the complaint are that Toolco violated the antitrust laws by certain exercises of its control relationship with TWA. But Congress vested in the Board plenary powers over the relationship between a party "engaged in a phase of aeronautics" and an air carrier which it controlled. Those Board powers are at least as comprehensive, and are to be exercised at least as much from the point of view of enforcing the competitive standard of the Act, as those—basically involving route allocation—which were involved in the *Panagra* case.

A. The Board has a broad panoply of powers over the control relationship between a party engaged in a phase of aeronautics and an air carrier.

(1) Under § 408 affirmative administrative approval, including a review of the competitive aspects, must be had before such a control relationship can be commenced. In determining whether control should be permitted, the Board must not only take into account the competitive standard enjoined on it by the Act, but must consider the other factors—relating to the development of a sound system of air transportation—specified in the Act, balance and articulate those factors, and come to an overall conclusion. The Board's powers in this respect are exclusive: this is

underscored by the fact that the acts which it has approved under § 408 are declared exempt from the antitrust laws by § 414.

(2) The Board's powers over such a control relationship merely begin with the commencement of that relationship. Through its use of the power to condition its original order authorizing control, specifically provided for in the Act and repeatedly implemented in practice, the Board maintains a continuing supervisory review, under the standards of the Act, over the exercise of the control relationship. Moreover, over the exercise of the control relationship the Board has investigatory powers under § 408(e), plenary substantive powers to suspend and modify its prior orders, powers of inquisition under § 408(d) and other provisions of the Act, and its powers (touched on in *Panagra*), over the carrier and the controlling party under its authority in § 411 to enjoin "unfair or deceptive practices or unfair methods of competition in air transportation." Through all these devices, regulation of the control relationship between a party, like Toolco, engaged in a phase of aeronautics, and an air carrier, becomes a process of continuing administrative review and supervision.

B. The legislative history of the Civil Aeronautics Act confirms the fact that Congress intended the Board to take in hand the question of the acquisition and maintenance of control over air carriers by other parties engaged in aspects of the aviation industry, and to regulate that relationship under standards—including antitrust standards—which the Board has the duty of defining and applying within the statutory

framework. Choices of contrary approaches were before the Congress and rejected by it.

The Board's power to grant antitrust immunity, by reason of § 414, to the commencement and exercise of the control which it sanctions under § 408, confirms the fact that with respect to matters touching on such a relationship, the antitrust laws are superseded. Moreover, the Board's practical exercise of its powers in the present case make it plain that it is by a real, not a theoretical, application of administrative powers that the direct enforcement of the antitrust laws has been superseded here.

II. Furthermore, in point of fact, the acts charged in the complaint have been exempted from the antitrust laws by orders of the Board under § 414 of the Act. That section provides an express exemption from the antitrust laws for conduct sanctioned by the Board's orders under § 408. The Board here, after exhaustive inquiry, on two occasions issued orders, first, permitting Toolco initially to acquire control of TWA, and later, in the light of its thorough review of the pattern of dealings between Toolco and TWA, permitting Toolco to increase its stock interest to 78 per cent. It took into account the pattern of dealing assailed by the antitrust complaint here. Furthermore, pursuant to a retention of jurisdiction in these orders, under its power to impose conditions on them, the Board received applications on, and approved, every material transaction between Toolco and TWA which forms the subject matter of the present complaint. With respect to these transactional orders, the exemptive power of the Board under § 414 is as broad as its substantive powers under § 408.

A. The Court of Appeals was in error in taking the view that while each specific transaction between Toolco and TWA might have been approved, some overall "pattern" of dealings represented by those transactions was not. Those transactions themselves gave ample indication of the pattern of dealing between Toolco and TWA; and from a variety of sources the Board was aware in depth of the nature of the relationship between Toolco and TWA.

B. If it is suggested that there was some "backdrop" to the dealings between Toolco and TWA of which the Board was not informed, the place to bring forth that backdrop is before the Board, not directly in court. For until the Board sets aside its orders, or they are reversed on judicial review, they remain in full force and effect.

C. Even if some of the allegations of the complaint could possibly be said to go to matters not before the Board, it still does not follow that the District Court had jurisdiction over the antitrust complaint. For the "dominant facts" of the complaint are related to matters which were before the Board. And so pervasive was the Board's scrutiny over the Toolco-TWA relationship that any possible question as to the scope of the exemption should be for the Board to resolve.

D. The fact that Toolco's voting rights in its TWA stock were suspended by the 1960 Voting Trust does not alter these conclusions. The exemptive orders remain in full force and effect. Moreover, it is clear from recent events that the Board is still applying its regulatory powers over the relationship between Toolco and TWA, and that there is a prospect of the reacquisition of full operational direction by Toolco

over TWA. Thus the need for the Board's continued regulatory jurisdiction remains.

III. The complaint demands divestiture of Toolco's ownership of TWA, and treble damages. The prayer for divestiture underscores the danger of a collision between the court and the administrative agency. A divestiture order in a judicial proceeding would be totally inconsistent with the Board's determination that the acquisition of the TWA stock was and is in the public interest. Nor do the courts presently have any jurisdiction to award treble damages. *Panagra* teaches that the Board's regulatory regime does not simply afford a parallel remedy, nor simply indicate that a court stay an action before it pending a reference to the Board for some sort of advisory determination. Rather, it teaches that the regulatory regime of the Board supersedes the operation of the antitrust laws, at least until the Board has specifically considered a question and determined not to approve and exempt the transaction in question. As to transactions actually exempted, antitrust claims are forever barred. Accordingly, the District Court had no jurisdiction over the complaint at this stage and it was error not to have dismissed it.

IV. The complaint should have been dismissed for failure to state a claim under the antitrust laws. It is indisputable that Toolco's acquisition of control over TWA was immune from attack under the antitrust laws by reason of the Board's approval. But since that *acquisition* of control could not have been attacked under § 7 of the Clayton Act—which is designed to prevent other antitrust violations in their incipiency—the *exercise* of that control thereafter could not be viewed as a violation of the antitrust laws.

Certainly there can be no unlawful monopolization of the "market" represented solely by an air carrier's needs for aircraft by a supplier when the acquisition of control of that customer by that supplier did not violate the antitrust laws. And likewise it cannot be said to violate the other provisions of the Sherman Act, or § 3 of the Clayton Act—however much the complaint is larded with antitrust terminology—for the acquiring company to "foreclose" the market represented by the acquired company. The premise of a Clayton Act § 7 action is that such a foreclosure will take place; but the acquisition here could not have violated § 7. Moreover, Toolco never manufactured aircraft usable by TWA; the complaint does not allege that it conspired in any way with an aircraft manufacturer. All that the allegations of the complaint amount to is that Toolco controlled access by TWA to manufacturers of aircraft. As a matter of law, Toolco, not a manufacturer of aircraft usable by TWA, could not, by exercising its power to control its subsidiary TWA, lessen competition in or tend to create a monopoly of the manufacture for, or sale of, aircraft to TWA, or of the furnishing of financing to TWA.

The courts below failed to realize that respondent in its complaint had simply used the jargon of antitrust to clothe a complaint essentially sounding in corporate mismanagement brought by a subsidiary against its parent. While the Federal courts are rightfully loath to dismiss an antitrust complaint *in limine*, not every complaint that takes the shape of an antitrust complaint is to be considered one. Here, the nature of the allegations of the complaint—relating simply to the relationship between a parent and a subsidiary, in which the parent was not the economic

source of the "commodities" consumed by the subsidiary—and with respect to which at least the commencement of the parent-subsidiary relationship had been exempted from the antitrust laws—makes it clear that the purported "antitrust" complaint should have been dismissed for failure to state a claim.

ARGUMENT

I. BY REASON OF THE FEDERAL AVIATION ACT, THE ANTITRUST LAWS ARE NOT APPLICABLE TO THE ACTS CHARGED AS ANTITRUST VIOLATIONS IN TWA'S COMPLAINT

The acts charged as antitrust violations in TWA's complaint are clearly acts bound up intimately with the Board's regulatory powers under the Federal Aviation Act. As this Court has put it, the acts charged relate to "precise ingredients" of the Board's authority—its authority to regulate a control relationship between an air carrier and a person "engaged in a phase of aeronautics." Therefore, under this Court's decision in *Pan American World Airways, Inc.* v. *United States*, 371 U.S. 296 (1963) (*"Panagra"*), they are "peculiarly a question for the Board" (*id.*, at 309), and the courts presently have no jurisdiction over them.

This Court, in the *Panagra* case, recently examined the relationship between the regulatory regime of the Board under the Federal Aviation Act (FAA) and the provisions of the antitrust laws. The Court there pointed out that, under the regulatory scheme of the Act, the Board "was to have broad jurisdiction over air carriers, insofar as most facets of federal control are concerned" (*id.*, at 304). Observing that the Board "in regulating air carriers is to deal with at least some antitrust problems" (*ibid.*), this Court held that the United States could not maintain a suit

in the District Court under the antitrust laws against an air carrier and an alleged co-conspirator.[1] The Court's holding was grounded upon the existence of various provisions in the FAA which vest authority in the Board over certain antitrust problems, and—although the case did not squarely involve the issue of the exercise of that power—upon the Board's express authority under FAA § 414 to confer antitrust immunity upon certain transactions.

In *United States* v. *Philadelphia Nat'l Bank*, 374 U.S. 321, 351 (1963), the Court summarized the *Panagra* decision as follows:

> "In Pan American, the Court held that because the Civil Aeronautics Board had been given broad powers to enforce the competitive standard clearly delineated by the Civil Aeronautics Act, and to immunize a variety of transactions from the operation of the antitrust laws, the Sherman Act could not be applied to facts composing the precise ingredients of a case subject to the Board's broad regulatory and remedial powers. . . ."[2]

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[1] The *Panagra* decision arose out of a Government civil antitrust complaint which charged that the defendants, Pan American and W. R. Grace & Co., a shipping common carrier, had established a Latin American airline joint venture, Panagra, pursuant to an agreement that Panagra would have the exclusive right to traffic along the west coast of South America while Pan American was to be free of competition from Panagra elsewhere in South America. The complaint also charged that Pan American used its 50 per cent control over Panagra to prevent it from applying to the Board for a route from the Canal Zone to the United States.

[2] In that case this Court, in holding the antitrust laws to be applicable to a bank merger, contrasted the Board's powers "with those of the banking agencies [which] have authority neither to enforce the antitrust laws . . . nor to grant immunity from those laws." 374 U.S., at 351.

This Court, to be sure, did not hold in *Panagra* that the antitrust laws are totally superseded with respect to all transactions involving regulated air carriers. The opinion of the Court made it clear that the question of the extent to which the provisions of the Federal Aviation Act displace the antitrust laws, vesting an exclusive jurisdiction in the Board, depends on the particular details of the antitrust violations charged and the specifics of the Board's regulatory power. However, if the acts charged go to the "precise ingredients" of the Board's regulatory authority (371 U.S., at 305)—if, as this Court put it, "the problem lies within the purview of the Board" (*id.*, at 312)—a complaint under the antitrust laws cannot be maintained, for otherwise "if the courts were to intrude independently with their construction of the antitrust laws, two regimes might collide." (*Id.*, at 310)

In the present case, the charges of violation of the antitrust laws center upon the relationship between Toolco, a corporation "engaged in a phase of aeronautics" (FAA § 408), and TWA, a regulated air carrier. The gravamen of the lender-management complaint is that Toolco violated the antitrust laws by certain exercises of its control relationship with TWA. The main thrust of the complaint is that Toolco used its control power over TWA to compel TWA to purchase or lease all of its aircraft requirements through Toolco rather than directly from the various aircraft manufacturers. As stated by the Court of Appeals, the complaint basically charges "an attempt to monopolize a substantial segment of interstate and foreign air commerce [through the compulsion just mentioned], imposition by the defendants on TWA of the condition that the airline not purchase or lease aircraft

from any supplier other than Toolco, and the tying of financing of aircraft acquisitions with the purchase of such aircraft from Toolco." 332 F.2d, at 608; R. 1422-23.

As we shall discuss, Congress vested plenary powers in the Board over the relationship involving control of an air carrier by a party "engaged in any phase of aeronautics." These powers vested in the Board are at least as broad and comprehensive—and are to be exercised by the Board at least as much, if not more, from the point of view of protecting competition and preventing situations in conflict with the antitrust laws —as those specifically involved in the *Panagra* case. Indeed, if there is any area in which the Board "in regulating air carriers is to deal with . . . antitrust problems" (*Panagra*, 371 U.S., at 304), it is in the supervision of the control relationship. As to that relationship, a " 'pervasive regulatory scheme' . . . including the antitrust laws . . . has been entrusted" to the Board. *Cf. California* v. *FPC*, 369 U.S. 482, 485 (1962). Accordingly, it follows as an *a fortiori* case from *Panagra* that the matters charged in the complaint in this case are vested within the jurisdiction of the Board, and that the complaint in this case could not have been maintained in the District Court.

A. The Statutory Scheme

It is appropriate, in light of the complaint, to analyze the facets of the Board's statutory powers over the control relationship between a party "engaged in a phase of aeronautics," like Toolco, and an air carrier.

(1) *Powers over commencement of the control relationship.*—The central weapon in the panoply of regulatory and remedial devices which the Board has over

the "antitrust" aspects of control of an air carrier is its power over commencement of the relationship under FAA § 408. Under the Act—unlike the provisions of many other regulatory statutes[3]—administrative approval is not required in every case before a party may acquire control of the regulated entity —the air carrier. In the ordinary case control of an air carrier may be freely transferred without the Board's permission or consent.

However, Congress made certain fundamental exceptions to this general rule. These exceptions are embodied in FAA § 408(a)(5). Under § 408(a)(5) an order of approval of the Board is required where control of an air carrier is to be acquired by another air carrier, by a common carrier, or by a person "engaged in any other phase of aeronautics." The Board is charged by Congress in § 408(b) not to approve any acquisition of control which "would result in creating a monopoly or monopolies and thereby restrain competition. . . ."

The thrust of these provisions is unmistakable. The acquisition of an air carrier by another air carrier, or by a common carrier, would raise the possibility of a restriction of horizontal competition among competitors; and the acquisition of an air carrier by a party "engaged in any other phase of aeronautics" might result in a vertical restraint of trade, through the foreclosure of competitors from dealing with the acquired air carrier. Accordingly, the acquisition of an air carrier by any of the persons specified is made

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[3] Compare Federal Communications Act, § 310(b), 47 U.S.C. § 310(b) (broadcast licenses).

unlawful unless approved by the Board, after a hearing, as consistent with the public interest.[4]

While FAA § 408 approval is only required in cases having some anticompetitive potential—and while the Board in granting its approval is enjoined from permitting a relationship which "would result in creating a monopoly or monopolies and thereby restrain competition"—short of this, the Board in determining whether a control relationship is in the public interest is not limited solely to considering antitrust factors. Rather, it must also take into account all of the policies delineated in FAA § 102 which include such factors as "the encouragement and development of an air transportation system," the "regulation of air transportation in such manner as to . . . foster sound economic conditions," and "the promotion . . . of civil aeronautics."

Moreover, it is obvious from the statutory scheme that the Board's power to deal with the antitrust problems inherent in the acquisition of control of an air carrier by a party of the nature specified in FAA § 408(a)(5)—a party like Toolco—must be an exclusive power. This is because of the power vested in

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[4] Another antitrust-oriented power given the Board to deal with "control" relationships between air carriers and other parties engaged "in any phase of aeronautics" is the provision that no interlocking directorship or interlocking officer relationship involving an air carrier and such a person may exist without Board approval. See FAA § 409(a)(1)-(6). The Board may approve such relationships by order, in which case § 414 provides antitrust immunity. The Board's administration of § 409, to prevent anticompetitive situations, has been vigorous. See, *e.g.*, *Lehman Bros.*, 15 C.A.B. 656, 660-63, 675, 682, 684 (1952), *aff'd sub nom. Lehman v. CAB*, 209 F. 2d 289 (D.C. Cir. 1953), *cert. denied*, 347 U.S. 916 (1954); *Frederick F. Robinson*, Dkt. 15229, Order E-21552, Dec. 2, 1964. All the interlocking relationships between TWA and Toolco, a person "engaged in a phase of aeronautics," were the subject of exemptive orders of approval of the Board. See n. 1, p. 68, *infra*.

the Board—in which the courts in a judicial antitrust suit do not partake[5]—to consider policy factors apart from the antitrust laws, in coming to an overall conclusion. The exclusivity of this power is further underscored by the fact that a control relationship approved under § 408(b) is declared exempt from the antitrust laws by FAA § 414. Thus the Board's determination as to the antitrust implications of the commencement of the control relationship—and its weighing of those implications with the other public interest factors—is declared to be final, except for judicial review.[6]

(2) *Continuing supervision of the control relationship.*—The Board's powers over the anticompetitive aspects of the control relationship are not exhausted by its approval of the acquisition of control. Instead, Congress vested in the Board a variety of administrative tools—which the Board has as a matter of practice exercised—whereby a continuing supervision over the competitive aspects of the control relationship is maintained, and any anticompetitive abuses of the control relationship are dealt with.

The lower courts erroneously concluded that the Board's powers under § 408 are brought to bear only at the time of the acquisition transaction itself. 332 F.2d, at 608 (R. 1422); 214 F. Supp., at 110 (A-123) However, it is a distortion of the statutory scheme—and it disregards the nature of the administrative process—simply to analogize the extent of the Board's powers over the control relationship to the functions of a court, or the Federal Trade Commission, in a case under § 7 of

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[5] See *United States* v. *Philadelphia Nat'l Bank*, 374 U.S. 321, 371. (1963).

[6] The existence of judicial review, of course, emphasizes the fact that the Board's regime supersedes the antitrust laws. See *United States* v. *Philadelphia Nat'l Bank, supra*, at 351, 353-54.

the Clayton Act, as the Court of Appeals apparently did, and as respondent urges (Br. in Opp. 18-20). When the full panoply of the Board's regulatory powers is considered, the real analogy is not to a § 7 case but to a continuing supervisory review and inquest over the anticompetitive aspects of the control relationship.

(i) *The conditioning power.*—Under FAA §408 (b) the Board is expressly authorized to approve the acquisition of control "upon such terms and conditions as it shall find to be just and reasonable." Pursuant to this power, the Board can impose such conditions on the acquisition of control as it may deem necessary or appropriate to prevent anticompetitive effects which it may deem likely to arise out of the control relationship.

Pursuant to § 408(b), the Board has repeatedly imposed continuing conditions on its approval of a control relationship. To provide a basis for continuous scrutiny against any possible misuse of the control power, provisions have been incorporated in approval orders prohibiting transactions above a specified dollar amount between the controlling party and the carrier, and requiring submission of special reports describing the dealings between the controlling party and the carrier. See, *e.g.*, *Central Airlines, Inc., Control Case*, 10 C.A.B. 538 (1949); *Wien, et al., Control and Interlocking Relationships*, 12 C.A.B. 281 (1950); *Robert Dollar Co.*, 17 C.A.B. 497 (1953); *Transocean Airlines*, 23 C.A.B. 439 (1956); *Arthur Vining Davis*, 23 C.A.B. 766 (1956); *RKO General, Inc.*, Dkt. 15700, Order E-21595, Dec. 17, 1964.

This is precisely what the Board has done in the present case. The Board was concerned with the pos-

sibility that Toolco, as a "dealer" in aircraft, might "take advantage of the relationship to its own profit and to the detriment of the public interest" (6 C.A.B., at 156). It, therefore, imposed upon the initial order granting approval to the control relationship the condition that—absent further approval—there be no commercial transactions between TWA and Toolco amounting to more than the nominal sum of $200. This condition made transactions between Toolco and TWA involving the purchase and leasing of aircraft and financing unlawful absent a specific approval by the Board. The focus of this condition on the competitive or "antitrust" problems inherent in the relationship is obvious.[7]

(ii) *Powers under § 408(e).*—The Board's powers to regulate the continuing relationship between the controlling party and the air carrier are not limited to those which have been specifically retained by the imposition of express conditions in the approval order.

The Board has without challenge exercised the power under FAA § 408(e), upon its own initiative, to investigate and to require a specific approval under FAA § 408(b) of any substantial change in the activities of the controlling party which might increase the anticompetitive effect of the control relationship. It was pursuant to this power that, for example, in 1956 the Board instituted an investigation into Toolco's plans to engage in the manufacture of jet aircraft. (A-187-89) (See pp. 27-28, *supra*)

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[7] Under § 1007 any such condition imposed upon an approval of control may be enforced by court action, and violations of such conditions may be punished by civil and criminal penalties provided for under §§ 901 and 902(a).

This power arises from the Board's authority under FAA § 408(e) to investigate "whether any person is violating any provision of subsection (a) of this section." In the case of a party subject to § 408(a)(5) by reason of being—like Toolco—a person "engaged in a phase of aeronautics," any substantial change in the type of "phase of aeronautics" engaged in by that party is viewed by the Board to require a new order of approval, upon hearing under FAA § 408(b), of the continuance of control of the air carrier. In those hearings, a further review of the competitive questions of course takes place.[8]

(iii) *Suspensory and modification powers.*—Unlike a court which has decided a Clayton Act § 7 case, the Board's powers over its initial order under FAA § 408(b) are hardly limited to the grounds for "relief from judgments" set forth in Rule 60 of the Federal Rules of Civil Procedure. Rather, under FAA § 1005(d): "the Board is empowered to suspend or modify [its] orders upon such notice and in such manner as [it] shall deem proper." Accordingly, for example, if it should appear that the control relationship is employed for anticompetitive purposes in a way not ap-

[8] Moreover, the Board—either upon private complaint "of any person," or upon its own initiative—has broad powers under FAA § 1002 to investigate and determine whether any person has failed to comply with any provision of the Act or any requirement established by the Board thereunder. Where a private complaint is filed and "the person complained against shall not satisfy the complaint and there shall appear to be any reasonable grounds for investigating the complaint, it shall be the duty of the Board to investigate the matters complained of. . . .". After any such complaint, or after any investigation on its own initiative, where the Board finds upon notice and hearing that any person has violated any provision of the Act or any requirement established pursuant thereto, the Board "shall issue an appropriate order to compel such person to comply therewith." FAA § 1002(c).

parent at the time of its approval, the Board may make such modifications in its approval order as may be necessary to deal with such misuse. As an ultimate weapon, in the event of a continued use of the control power in violation of the Board's policies, the Board can even suspend its approval of the control relationship—in short, require divestiture.

(iv) *Inquisitorial powers.*—The Board has broad inquisitorial powers to implement its substantive powers under FAA § 408. It is authorized under FAA § 408(d) to subject a party whose control of an air carrier has been approved under § 408(b) to the same requirements relating to accounts, records and reports as an air carrier. These include the authority of the Board to require regular reports, as well as "specific answers to all questions upon which the Board may deem information to be necesary," and also the filing of "any contract agreement, understanding, or arrangement" between the carrier and others. (FAA § 407(a)) In support of these powers over the control relationship, the Board has a mass of information-gathering functions with respect to the airlines generally. (See pp. 74-78, *infra.*) And under FAA § 415, the Board is authorized to inquire into the management of air carriers, and may require from the party in control of the air carrier "full and complete reports and other information."[9]

(v) *Powers over the controlling party under § 411.* —It also appears that under § 411 of the Act the Board has the power to enjoin any anticompetitive misuse of the control relationship, regardless of whether such conduct comes within the scope of § 408. Section

[9] The Board may enforce compliance with these provisions by judicial action, among other means. See FAA § 1007.

411 authorizes the Board to enjoin "unfair or deceptive practices or unfair methods of competition in air transportation." In *Panagra*, this Court held that § 411 gave the Board the power to deal with the anticompetitive aspects of acts coming within the "precise ingredients" of its regulatory authority, including the misuse of the control of an air carrier. It is true that § 411 makes explicit reference only to unfair methods of competition by air carriers and ticket agents. This Court's decision in *Panagra*, however, expressly left open the question whether under § 411 the Board could proceed against W. R. Grace & Co., which was not itself an air carrier, but had 50 per cent control over *Panagra*. The Court stated (371 U.S., at 310 n. 14):

> "An 'air carrier' is defined in §1(2) as 'any citizen of the United States who undertakes, whether directly or indirectly or by a lease or any other arrangement, to engage in air transportation. . . . Whether there might be a 'reasonable basis in law' . . . for a Board conclusion that Grace is an 'air carrier' by reason of its negative control over Panagra is a matter on which we intimate no view. We mention the matter so as not to foreclose the question by any implication drawn from our separate treatment of common carriers and air carriers."

Thereafter, the Board initiated an investigation as to whether Grace had engaged in unfair practices in violation of § 411 of the Act. (Order E-19789, July 9, 1963.) This action by the Board clearly indicates that it construes § 411 broadly enough to include within its scope the anticompetitive practices of persons exercising control over an air carrier. Such a construction by the Board is plainly consistent with this Court's approach in *Panagra*, where this Court, in

holding that the cease and desist power under § 411 includes the power of divestiture, stated

> "... [W]here the problem lies within the purview of the Board, as do questions of ... the affiliation of common carriers with air carriers, Congress must have intended to give it authority that was ample to deal with the evil at hand." (371 U.S., at 312)

Here, of course, Toolco's stockholdings, unlike those of Grace over Panagra, were sufficient to give it positive control over the operating air carrier, rather than simple negative control; a clearer case is thus presented for treating it as an "air carrier" for the purposes of FAA § 411.

B. The Legislative History

The legislative history of § 408 confirms that Congress intended to give the Board broad powers to deal with the anticompetitive problems inherent in the control of an air carrier by a person engaged in a phase of aeronautics. That history also confirms that, to the extent the Board was given power to take such a matter in hand, the operations of the antitrust laws were to be superseded.

The forerunner of FAA § 408 was § 7 of the Air Mail Act of 1934, 48 Stat. 936.[10] Section 7(b) of that Act was an absolute prohibition against any holding company or company engaged in any phase of the aviation industry controlling any interest "in any other partnership, association, or corporation which holds an air mail contract."

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[10] It was enacted as a result of an investigation by a Congressional Committee into abuses arising out of the control of air carriers by airplane manufacturers and holding companies. *Hearings Before the Special Senate Committee on Investigation of Air Mail and Ocean Rail Rates*, 73rd Cong., 2d Sess. (1934).

In 1935 a Federal Aviation Commission, which had been appointed by the President to make an "immediate study and survey, and to report to Congress . . . its recommendations of a broad policy covering all phases of aviation . . ." proposed a relaxation of this absolute prohibition. The Commission agreed with the purpose of the Air Mail Act that

> "[t]here should be no merger of aeronautical enterprises in such a way as to . . . allow a manufacturer of equipment to establish himself in a preferred position based on anything other than the quality of his product." S. Doc. No. 15, 74th Cong., 1st Sess. (1935), p. 69.

It recommended, however, that instead of the blanket prohibition against control of an air carrier by such a company

> "[t]he ownership of stock in air lines by corporations engaged in other activities, or the interlocking of diverse aeronautical interests, should be strictly controlled by the commission hereinafter proposed." *Ibid.*

The report emphasized that

> "[n]othing should be permitted which would in any way reduce the effectiveness of any competition, the preservation of which could serve the public interest, or which would interfere with the exercise of the government's regulatory functions. Subject to these paramount considerations, the door should be left open as far as possible for a free flow of investment capital into air transportation in the interest of a strengthening of its structure and an improvement of its facilities." *Ibid.*

The Commission observed:

> "We have been driven to the conclusion that there can be no simple rule which will govern all

cases without danger to the public interest either through the development of monopoly on one hand or through the destruction of credit and the checking of a free flow of investment capital on the other. It seems to us that . . . the concentration of ownership of large blocks of their [the airlines'] stock, and the selection of their directors, should be under a very definite governmental control, at least equivalent to that exerted over the railroads by the Interstate Commerce Commission . . . .

"A regulatory commission ought, in our opinion, to have before it a clear statement of the general purpose and policy to be pursued. In the application of the policy and the pursuit of the purpose, we consider that it should be left free to meet individual cases as they arise." *Id.*, at 70.

FAA § 408 embodies this recommendation of regulation rather than absolute prohibition of control of an air carrier by a competitor or supplier. The clear purpose of this provision, as reflected in the Senate debate on the bill (see, *e.g.*, 83 Cong. Rec. 6730), was to avoid the anticompetitive evils inherent in such a control relationship without at the same time absolutely foreclosing control of an air carrier by a competitor or supplier.[11] For such a relationship might,

[11] A provision of the earlier House Bill of 1937, H.R. 7273, 75th Cong., 1st Sess., § 311(b)(5), made it unlawful, without agency approval:

"for a person or persons engaged in the manufacture or sale of aircraft, or other equipment, materials, or accessories generally used in air transportation, to purchase, lease, contract to operate, or acquire control of the properties or stock of one or more air carriers subject to this Act; or for an air carrier or carriers subject to this Act to purchase, lease, contract to operate, or acquire control of, the properties or stock of one or more persons engaged in the manufacture or sale of aircraft,

on balance, be determined to be in the public interest, as by providing necessary support to the carrier in the fulfillment of its responsibilities to the public; and Congress recognized that such a relationship, in an appropriate case, could facilitate the development of an air transportation system adapted to the needs of the country, promote civil aeronautics, and further the other objectives sought to be achieved by the Act. See FAA § 102. A regulatory approach was thus to succeed the prohibitory approach of the Air Mail Act —and of the antitrust laws.[12]

The Senate debate further indicates that it was the clear purpose of Congress that the competitive mat-

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or other equipment, materials, or accessories generally used in air transportation."

A spokesman for the interdepartmental government committee which sponsored the 1938 Act explained:

> "H.R. 7273 contains provisions prohibiting consolidations, mergers, and acquisitions of control involving air carriers, unless approved by the Commission. The analogous provisions in the present bill are substantially similar to those in H.R. 7273 but extend the prohibitions to include not only air carriers but also all common carriers, companies engaged in any phase of aeronautics, and foreign air carriers. It was thought that the extension of these prohibitions in this manner was necessary in order to completely guard against the evils which may arise from such transactions." Statement of C. M. Hester, Assistant General Counsel of the Department of the Treasury, Hearings on H.R. 9738 before the House Committee on Interstate and Foreign Commerce, 75th Cong., 3d Sess. 44-45 (1938).

[12] As the Court of Appeals for the District of Columbia Circuit has stated, Congress determined in enacting the FAA that the "aircraft industry, like railroads and power, is one in which . . . the public interest is best served, not by free competition, but rather by direct and uniform regulation by an 'agency authorized to supervise almost every phase of the regulated company's business.'" *S.S.W., Inc.* v. *Air Transport Ass'n*, 191 F. 2d 658, 661 (D.C. Cir. 1951), *cert. denied*, 343 U.S. 955 (1952).

ters decided by the Board under § 408 should be broadly exempted from the antitrust laws under § 414 of the Act, and that all antitrust aspects of such matters should be dealt with exclusively by the Board. Strongly indicative of such purpose is the following colloquy of Senator McKellar and Senator Truman with Senator McCarran, one of the co-sponsors of the Act (83 Cong. Rec. 6728-6729):

> "Mr. MCKELLAR. The provision in the bill would repeal the present antitrust provisions of the air-mail laws, would it not?
>
> "Mr. TRUMAN. That is correct.
>
> * * * *
>
> "Mr. MCKELLAR. . . . I think this body ought never, under any circumstances, to pass a bill which will allow a commission of the Government to permit consolidations and combinations into a trust in restraint of trade, in violation of the present law. [The Air Mail Act of 1934.] I think the Senate ought not to pass any such bill.
>
> "MR. TRUMAN. Let me read the proviso. . . . '*Provided,* That no consolidation, merger, purchase, lease, operating contract, or acquisition of control shall be approved if such approval would result in creating a monopoly or monopolies and thereby unduly restrain competition or unreasonably jeopardize another air carrier not a party to the consolidation, merger, purchase, lease, operating contract, or acquisition of control.'
>
> * * * *
>
> "Mr. MCCARRAN. The Senator from Tennessee [MR. MCKELLAR] raises a straw man for the purpose of knocking him down. The Senator from Tennessee is indeed an artist at that particular art. He will concede that some agency must have independent and individual judgment.

"Mr. McKellar. Certainly; but we have such an agency. We have the Department of Justice, whose duty it is to prosecute those who violate our antitrust laws. It is for that reason that I disagree with my friend.

* * * *

"Mr. McCarran. . . . Protection has been written into the bill against combinations and monopolies in restraint of trade, in restraint of commerce, and in restraint of everything which would constitute a monopoly.

"A moment ago the Senator from Missouri [Truman] read an extract from the bill. There can be no stronger language than that provision.

* * * *

"The Senator from Missouri and myself have tried to work into this proposed law provisions which would guard against anything savoring of monopoly. We have tried to work into the bill provision for an independent agency to control one of the greatest avenues and opportunities for commerce we will have 10 years from now."

The issue squarely raised by the colloquy was resolved, by the passage of the Act in its present form, against direct application of the antitrust laws and in favor of the administrative approach set forth in FAA §§ 408 and 414.[13]

[13] The anti-monopoly proviso quoted by Senator Truman was actually strengthened still further prior to passage by the striking out of the words "unduly" and "unreasonably," at the suggestion of Senator Borah. Senator Copeland, Chairman of the Senate Committee on Commerce, said of this proposal:

"I wish to say to the Senator from Idaho that, so far as I am concerned, I will be perfectly satisfied to have the two words "unduly" and "unreasonably" stricken from the bill, because it was the purpose certainly of the Commerce Committee, and I have no doubt of the Interstate Commerce

To sum up, the Board has a broad and continuing authority to deal with the anticompetitive aspects of the acquisition of control, and the exercise of that control, over an operating air carrier by a party engaged in a "phase of aeronautics". The Board has the duty to exercise that authority under standards which the Board itself has the primary responsibility under the law to articulate. Any more restrictive view of the Board's power over a control relationship involving a company, like Toolco, engaged in a "phase of aeronautics," would, as said in *W. R. Grace & Co.* v. *CAB*, 154 F.2d 271, 287 (2d Cir. 1946), *cert. dismissed*, 332 U.S. 827 (1947):

> "disregard the numerous provisions of the Civil Aeronautics Act [§§ 407, 408, 409, 411] directing and authorizing the Board, in safeguarding the public interest and in carrying out the declared policy of the Act, to investigate, supervise and

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Committee, so to write this bill as that there should be no monopoly."

"Mr. TRUMAN. That is the point. We want to write it so that there will not be monopoly . . ." (83 Cong. Rec. 6730).

During the discussion of Senator Borah's proposal, it was the common assumption and understanding of all concerned that enforcement of the policy of the antitrust laws in situations arising out of acquisitions of control of an air carrier was confided to the Board under § 408. See, *e.g.*, 83 Cong. Rec. 6730 (remarks of Sen. McCarran); 83 Cong. Rec. 6731 (remarks of Sen. Borah). The question was as to the phrasing of the legislative standard to be confided to the Board for its administration.

The mandate and authority to enforce the policy of the antitrust laws thereby given to the Board were more explicitly delineated in the FAA than in any similar regulatory legislation. See, *e.g.*, the comparable provisions of the Shipping Act, § 15, 46 U.S.C. § 814; the Interstate Commerce Act, § 5(2), 49 U.S.C. § 5(2); the Federal Communications Act, §§ 221, 222, 47 U.S.C. §§ 221, 222; the Federal Power Act, § 203, 16 U.S.C. § 824b.

> do the needful, with respect to the management and control of air carriers."[14]
>
> * * * * *

It accordingly follows, even more strongly in this case than it did in *Panagra*, that the matters embraced in TWA's complaint have been entrusted to the Board. These matters are—as were the matters of route allocation involved in *Panagra*—the subject of comprehensive regulatory powers vested in the Board. The potentially anticompetitive aspects of the Toolco-TWA control relationship were thus matters "fully regulated" by the Board. *Cf. United States* v. *RCA*, 358 U.S. 334, 347 (1959).

Moreover, unlike the route allocation function involved in *Panagra*, the particular powers entrusted to the Board which are involved in this case are pointed precisely at the regulation of a relationship which was considered by Congress to have antitrust implications. The Board was ordained by Congress to be the proper authority to scrutinize these relationships and to articulate the extent to which they should be tolerated, balancing antitrust considerations and the peculiar needs of the airline industry. This is underscored by the fact that the relationships approved under FAA § 408—unlike matters touching the route allocations involved in *Panagra*—receive, by virtue of § 414 of the Act, express immunity from the operations of the antitrust laws. See *California* v. *FPC*, 369 U.S.

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[14] In that case the court reversed the action of the CAB dismissing for lack of jurisdiction a complaint filed by Grace which alleged that Pan American had misused its 50% share ownership of Panagra to prevent competition between Pan American and Panagra.

482, 485-86 (1962); *United States* v. *Philadelphia Nat'l Bank*, 374 U.S. 321, 350 (1963).

That this case follows as an *a fortiori* proposition from the decision in *Panagra* is underscored by the fact that, even under the standards articulated in Mr. Justice Brennan's dissenting opinion in *Panagra*, the conclusion is inescapable that the issues presented by the present complaint have been delegated exclusively to the Board. In the first place, the basic issues in this case do not involve FAA § 411, as did *Panagra*, but FAA § 408. Section 408, as the dissent pointed out, is by reason of FAA § 414 a provision superseding and providing an exemption from the antitrust laws—not one like § 411 which simply provides a remedy parallel to the antitrust laws. See 371 U.S., at 320, 332. Within the view of that dissent, this is then a hard-core case for supersession of the antitrust laws, a case where there is "a possibility that a subsequent administrative decision would approve the questioned activities."[15] Schwartz, *Legal Restriction of Competition in the Regulated Industries*, 67 Harv. L. Rev. 436, 464 (1954), quoted with approval in the dissent, 371 U.S., at 332.

Furthermore, to quote the dissent, this is far from an example of a case in which the agency has exhibited a "considered sense of self-limitation" (371 U.S., at 328); rather, it is a case where the Board has constantly exercised a most pervasive jurisdiction and where, in fact, the Court of Appeals seems to have mistakenly indulged the thought that the Board's regulation of the control relationship between Toolco and TWA might, in its thoroughness, have gone past the limit of the Board's statutory powers. See 332

[15] In fact, as we develop below, the activities have already been exempted administratively.

F.2d, at 608-09; R. 1423-24. It is by a real, not a theoretical, application of administrative powers that the direct enforcement of the antitrust laws is superseded here.

In summary, we have shown in this Part that even if the Board's powers, with the resulting exemptions under § 414, had not been exercised as pervasively and repeatedly as they have been in fact with respect to the relationship between Toolco and TWA, the existence of the Board's panoply of powers respecting the relationships involved here would be sufficient to require that the present complaint, which deals entirely with matters touching this relationship, be dismissed. See *Far East Conference* v. *United States*, 342 U.S. 570, 577 (1952); *United States Navigation Co.* v. *Cunard S. S. Co.*, 284 U.S. 474 (1932); *Keogh* v. *Chicago & N.W. R. Co.*, 260 U.S. 156 (1922). The function of the courts is to provide judicial review, according to established standards, of the Board's orders (see *United States* v. *Philadelphia Nat'l Bank*, 374 U.S. 321, 351, 353-54 (1963)); or, once the Board has precisely ruled on a particular complaint and determined all the substantive issues in favor of the existence of a violation of law—a far cry, indeed, from the situation here—to award a remedy not available before the Board. See *Hewitt-Robins, Inc.* v. *Eastern Freight-Ways, Inc.*, 371 U.S. 84, 88-89 (1963).

II. THROUGH ORDERS OF THE BOARD, THE ACTS CHARGED IN THE COMPLAINT HAVE BEEN EXEMPTED FROM THE ANTITRUST LAWS BY SECTION 414 OF THE FEDERAL AVIATION ACT

In Part I we have demonstrated that, even apart from the fact of Board approval of the details of the course of dealing between Toolco and TWA through the years, the complaint in the present case could not

be maintained because, as to the matters alleged in it, the jurisdiction of the District Court has been superseded by the regulatory powers of the Board. In Part I, we did not dwell on the extensive pattern of regulatory review and the numerous orders of the Board which have, in fact, been made and entered, and which exempted Toolco from the operations of the antitrust laws, pursuant to FAA § 414. In this Part, we turn to these orders and to their effect.

Section 414 of the FAA furnishes an express exemption from the antitrust laws. See *United States* v. *Philadelphia Nat'l Bank, supra,* 374 U.S., at 550. It provides that "any person affected by any order made under Section 408 . . . of this Act shall be, and is hereby, relieved from the operations of the 'antitrust laws' . . . and of all other restraints or prohibitions made by, or imposed under, authority of law, insofar as may be necessary to enable such person to do anything authorized, approved, or required by such order."

The "crux" of the complaint, as described by counsel for TWA, involves "Toolco's acts and efforts, through the exercise of its stock control over TWA, to control and dictate the manner and method by which TWA acquired aircraft and the necessary financing therefor." (f. 134) By reason of its two orders approving Toolco's control over TWA, and its subsequent orders, entered in the context of comprehensive Board surveillance over TWA's activities, approving every material transaction between Toolco and TWA—nineteen orders in all—the Board has exempted all the matters alleged in the complaint from the operations of the antitrust laws, pursuant to FAA § 414.

1. *The effect of the basic "control" orders.*—In the first place, in the two basic decisions approving Toolco's acquisition of control and of further control over TWA (6 C.A.B. 153 (1944); 12 C.A.B. 192 (1950)), the Board not only considered the effect of Toolco's having a mere financial investment in TWA but looked in practical fashion into the specific effects upon competition of the readily foreseeable actions which Toolco might take with respect to TWA once control was approved. The Board, at the time of the original acquisition of control, was aware that Toolco could be considered a "dealer" in aircraft—i.e., a company which acquired aircraft made by others, and sold or otherwise made them available to airlines. The Board thoroughly canvassed the anticompetitive effects which might be expected to flow from this fact. The Public Counsel of the Board and the Department of Justice both directed the Board's attention to problems they deemed to be inherent in the Toolco-TWA relationship. In the original control case, the Board specifically took into account the possibility of Toolco's "forcing" of aircraft on TWA, weighed this factor (6 C.A.B., at 156) and permitted the acquisition of control, subject to the continuing stringent condition against unapproved dealings between Toolco and TWA which we have already touched on.

In ordering a hearing in the *Further Control* case in 1948, the Board again demonstrated that it was not considering Toolco's "control" of TWA as a financial abstraction—merely an increased percentage of stock interest—but as an operational concept, in terms of the exercise of managerial power such control would give Toolco. As the record makes clear, the Board was vividly aware that the new acquisition gave Toolco absolute "life and death" power over TWA; that

Toolco had conditioned its agreement to lend further money to TWA on being able to have absolute operational and managerial control; and that under the new relationship TWA would respond to Toolco's direction. The Board also specifically pointed out that one of the new aspects of control which Toolco had over TWA was an agreement under which "TWA was required to come to Toolco to obtain consent of the latter before purchasing additional equipment." (9 C.A.B., at 391 n. 18; *id.* at 385)

The hearing on the *Further Control* case ranged over the entire history of the Toolco-TWA relationship and the full spectrum of activities which that relationship encompassed. Indeed, the Board expressly declined to limit its inquiry merely to conflicts of interest between Toolco's current activities in aeronautics and its control of TWA. It conceived that its function in approving an acquisition of control in the public interest was much broader and more intensive—both that of analyzing the undesirable influences on a carrier which might arise from a controller's interest in a phase of aeronautics and that of considering the "over-all impact" of the controller's plans and policies, past and present, on the carrier. It made it plain that its role was not to rubber-stamp an already established private relationship and that it was not a backstop merely exercising a reserved power of veto. Rather, its task was that of affirmatively determining whether the acquisition furthered the public interest objectives of the Act, as set forth in FAA § 102, in the light of Toolco's actions and policies with respect to TWA in such matters as financing, acquisitions, and management—the very matters which now form the subject matter of the lender-management complaint.

Thus the Board's inquiry called in question, and subjected to close analysis, Toolco's management policies in the very areas which are now sought to be made the subject matter of antitrust charges by the characterizations of the lender-management complaint. The Board reviewed in minute detail Toolco's stewardship of TWA. It carefully scrutinized Toolco's policy of having TWA raise new capital primarily by debt rather than equity financing. (12 C.A.B., at 199-224; see complaint paras. 23, 27-28; A-14, 15) It reviewed Toolco's participation in the acquisition of equipment by TWA (12 C.A.B., at 207, 210, 217; see complaint paras. 11, 18, 20, 22, 24; A-10, 12-15). It analyzed the Toolco role in the financing of TWA (12 C.A.B., at 208, 216-217), a present subject of the lender-management complaint (paras. 20, 23, 24, 26; A-13, 14, 15).

After this elaborate consideration of Toolco's management policies and programs for TWA, the Board found Toolco's role in the acquisition of TWA's equipment and financing, not only consistent with the mandate of § 408 to prevent monopolistic conditions in the aeronautics industry, but a positive factor supporting the enhanced control of Toolco over TWA. With full knowledge that the new acquisition gave Toolco "complete actual and legal control" of TWA, the Board affirmatively determined that Toolco's exercise of control over TWA, past and prospective, furthered the public interest objectives of the Act.

In the light of the comprehensive character of the Board's inquiry, its own expansive conception of its role, and its affirmative conclusions as to the public benefits flowing from Toolco's control of TWA, it strains credulity to conclude, as the courts below apparently did, that all the Board approved in the control orders was the bare abstraction of Toolco's "con-

trol" totally divorced from its exercise. It was with the *exercise* of Toolco's control of TWA, past and prospective, that the Board was concerned throughout. In approving Toolco's absolute control of TWA, the Board must have understood that Toolco would exercise that control. Otherwise the review of Toolco's past and prospective policies and programs for TWA was irrelevant. Otherwise the affirmative determinations that TWA and the public would be benefitted by Toolco's continued interest in TWA was so much surplusage. Otherwise both the control orders themselves and the Board's express retention of jurisdiction to pass on all significant TWA-Toolco transactions—thereby asserting a continuing check on how well Toolco exercised its control—were trivial acts, merely approving a financial investment carrying with it none of the normal incidents and perquisites of ownership.

Obviously the Board's jurisdiction to approve acquisitions of control under § 408 was not given to it simply to allow it to authorize persons engaged in a phase of aeronautics to hold more stock and thereby derive greater income from air carriers. The concept of control incorporated into the regulatory framework makes sense only insofar as it means and necessarily implies the exercise of managerial and operational power by the controller over the business of the controlled party, such as Toolco has exercised over TWA. To read the control orders as TWA would now have this Court do is to attribute to the Board an exercise in futility and empty rhetoric.

Any possible doubt as to the fact that the Board's orders approving a control relation approve the exercise of that control is, finally, dispelled by the Board's practice under FAA § 409. Under that section, interlocking directorships or interlocking officerships be-

tween air carriers and persons engaged "in any phase of aeronautics" are prohibited absent an order of approval from the Board. It has been the Board's consistent practice not to approve interlocking relationships between equipment suppliers and air carriers under § 409. See, *e. g., Lehman Brothers,* 15 C.A.B. 656, 660-63, 675, 682, 684 (1952), *aff'd sub nom. Lehman* v. *CAB,* 209 F.2d 289 (D.C. Cir. 1953), *cert. denied,* 347 U.S. 916 (1954); *Frederick F. Robinson,* C.A.B., Dkt. 15229, Order E-21552, Dec. 2, 1964.

However, while the Board has not generally permitted interlocking relationships between equipment suppliers and air carriers under § 409, it has done so where it has also approved the acquisition of control of the carrier by the supplier under § 408. See, *e. g., Transocean Control and Interlocking Relationship,* 18 C.A.B. 570 (1954); *Transocean Interlocking Relationship,* 23 C.A.B. 439 (1956). Obviously, the approvals of such directorships must have contemplated that the directors in question would, in fact, direct—that is, *exercise* the control which the stockholder they represented possessed over the carrier. The Board's general restriction of § 409 approvals of interlocking relationships between equipment suppliers and air carriers to situations where a control relationship has been approved under § 408 makes it plain that in the Board's view its approval of the acquisition of control also involves an approval of the exercise of control.[1]

* * * * *

[1] The Board issued seven orders approving interlocking relationships between Toolco and TWA. Orders 3662, May 10, 1945; E-429, Apr. 4, 1947; E-4223, May 24, 1950; E-4999, Jan. 4, 1951; E-10024, Feb. 21, 1956; E-10310, May 23, 1956; E-14251, July 22, 1959.

It bears emphasis that the Board's power to approve acquisitions of control, and the exemption from the antitrust laws attendant on such orders of the Board, serve important public purposes. They do not exist in a vacuum but must be read and understood in the context of the Board's mandate to advance the public interest in the manner and matters set forth in FAA § 102. Exemption from the antitrust laws thus serves the positive purpose of helping the Board achieve the objectives of the Act. The Board found—in respect of the very kinds of matters embraced in the present complaint—that the exercise of absolute control by Toolco over TWA would not create monopoly, would benefit TWA, and would serve the public interest as set forth in § 102. To construe those orders and the exemption provision of the Act as narrowly as did the courts below would undermine the objectives the Board sought to achieve.

2. *The effect of the orders made pursuant to the conditioning power.*—The Board was not content to pass upon the acquisition of control of TWA by Toolco simply in the light of its predictions as to the potential anticompetitive effects which might, on a detailed analysis, be anticipated to flow from the acquisition of control; or even as to those effects which were fully evident by the 1950 *Further Control* case. Through the conditioning power it subjected the Toolco-TWA control relationship not simply to a one-time adjudication in the nature of a judicial or FTC proceeding under § 7 of the Clayton Act, but to a continuous regulatory scrutiny. Through the conditions imposed, the Board was able to analyze and regulate the control relationship between the parties, not simply on the basis of predictions of what would happen, but day

in, day out, on the basis of actual transactions which took place by reason of the control relationship.

It flies in the face of the statute—as well as of the Board's settled practice under the statute—to view (as the Court of Appeals did) the Board's conditioning practice as a useless appendage, unworthy of judicial respect. As we have indicated, the statute expressly gives the Board power to condition its approval of a control relation; and the Board, taking no niggardly view of its responsibilities, has repeatedly imposed continuing conditions on such approvals. See *Central Airlines, Inc., Control Case,* 10 C.A.B. 538 (1949); *Robert Dollar Co.,* 17 C.A.B. 497 (1953); *Arthur Vining Davis,* 23 C.A.B. 766 (1956); *RKO General, Inc.,* Dkt. 15700, Order E-21595, Dec. 17, 1964. Cf. *Transocean Airlines,* 23 C.A.B. 439 (1956); *Wien et al., Control and Interlocking Relationships,* 12 C.A.B. 281 (1950). The conditioning practice was expressly recognized and approved by this Court in *Panagra.* 371 U.S., at 312.

It is through this—and the other administrative tools in its possession—that the Board makes a § 408 control case not the exercise in probabilities and predictions that a Clayton Act § 7 case is, but the vehicle for a continuing review, and regulatory approval or disapproval, of the whole course of conduct between the controlling party and the air carrier. To attempt to equate the scope of the Board's determinations under §§ 408(a)(5) and 408(b) with that of a court case under § 7—and to denigrate the Board's power to grant transactional approvals through the conditioning process—is to ignore a substantial history of administrative practice, the clear language of the statute, and this Court's approval of the conditioning power.

The scope of the antitrust immunity under FAA § 414 is as broad as the approval under § 408(b). For § 414 declares that the immunity goes as far as is necessary to enable "any person affected by [the] order" "to do anything authorized, approved, or required by such order." The Board's transactional orders approved the transactions between Toolco and TWA. And under the jurisdiction reserved to administer the conditions, the Board, when it took favorable action on a transactional application, followed the practice of approving the transaction and amending the original control order so as expressly to permit the transaction. Thus the form of the Board's order confirms its substance—a continuing transactional review and approval of the exercise of the control relationship in practice. To argue that the exemptive power under § 414 only extends to the simple acquisition of control amounts to nothing more than an argument that the Board's powers under § 408 are similarly limited, which obviously cannot be maintained.

The question as to the scope of the Board's exemptive power does not turn, as the Court of Appeals thought, on whether the courts or the Board are more competent or skilled in passing on antitrust matters. If the only relevant legal factors in issue were antitrust considerations, the answer to that question would be easy. The question, rather, is one of power. Congress has granted an express exemptive power to the Board in FAA § 414. It did so for a purpose—to enable the Board to fashion and apply a competitive standard in the light of the public interest factors detailed in FAA § 102. The Board has repeatedly exercised that power here. "It is not for this Court, or any other, to override a policy, or an exemption

from one, so clearly and specifically declared by Congress, whatever may be our views of the wisdom of its action." *McLean Trucking Co.* v. *United States*, 321 U.S. 67, 79 (1944). Certainly, it matters not whether that exemption is self-executing or dependent on an administrative process.

Our Statement of Facts analyzes in depth the numerous transactional approvals granted by the Board. It discusses the details of the Board's scrutiny of the dealings between Toolco and TWA relating to TWA's acquisition of jet aircraft, on which the complaint spends much energy. Collectively, the effect of the exemptions attaching to each of these transactional approvals—taken together with the two plenary investigations into Toolco's control position and practices—is to cut the heart out of the antitrust allegations of the lender-management complaint.[2]

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[2] Certain allegations of the complaint, not content to deal with Toolco's actions with respect to TWA before its voting rights were stripped away by the imposition of the Voting Trust, actually charge that the "antitrust" offenses continued after the imposition of the Voting Trust in December, 1960. These charges allege in effect that Toolco attempted to have TWA follow the policies and plans which had been developed by Toolco prior to the imposition of the Voting Trust rather than those ordained by the lender-management.

For example, Toolco is alleged to have attempted in various ways to have TWA purchase from Toolco certain Convair aircraft previously ordered by Toolco from Convair, instead of Boeings ordered by the new lender-management (Paras. 37, 38, 39, 42, 44; A-18-20). No such transaction between Toolco and TWA could take place without specific Board approval, since the conditions in the 1944 and 1950 orders have never expired and the Board has made it plain that it has retained jurisdiction after 1960 over the relationship between Toolco and TWA; see pp. 81-82, *infra*.

Toolco is also alleged to have sought a merger between TWA and Northeast Airlines, which of course would also have required a Board Order under § 408(a)(1); and to have attempted to

There are certain further points relating to the Board's orders raised by respondent or the Court of Appeals to which brief response is necessary.

A. The Court of Appeals apparently was of the view that although each specific transaction between Toolco and TWA may have been approved, the overall pattern of dealing represented by those transactions was not. Thus, though the Board may have in-

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regain plenary control over TWA, which would have required Board action under § 408(a)(5); see pp. 81-82, 96, *infra*.

All these allegations thus concern matters subject to the superseding regulatory regime of the Board. Board orders permitting these acts would carry an antitrust exemption under § 414.

The only other charge as to post-1960 acts is that Toolco filed statements with the Securities and Exchange Commission setting forth its views on the legal validity of the Voting Trust and other matters concerning the policies of TWA under the new lender-management (Paras. 41, 42; A-19-20). Surely, the antitrust laws do not make illegal such communications by private persons with governmental bodies. *Cf. Eastern R. R. Presidents Conf.* v. *Noerr Motor Freight, Inc.*, 365 U.S. 127 (1961).

These allegations no more constitute cognizable claims of antitrust violation than the charges that in 1959 Toolco caused six Boeing jet aircraft then on order for eventual assignment to TWA to be "diverted" to TWA's principal transatlantic competitor, and that in 1960 Toolco arranged for the lease to Northeast Airlines of six Convairs on order to Toolco, three of which Toolco had previously agreed to assign to TWA. (Paras. 18, 22; A-13, 14) The decision as to how many aircraft TWA actually required at a given time represents conventional management decision-making clearly contemplated by the orders authorizing Toolco to acquire and exercise complete control of TWA. There is no allegation that either of these "diversions" was done pursuant to a conspiracy with a competitor of TWA to restrain commerce in air transportation.

Even read most expansively, all these allegations are merely peripheral to the conduct essentially relied on by the complaint as constituting antitrust violations, if indeed they can be thought to have any antitrust significance at all. Since, as we have shown, that conduct was confided to the regulatory jurisdiction of the Board and encompassed within the Board's orders, these allegations cannot stand independently.

dividually approved the acquisition of aircraft by TWA from or through Toolco, it is said that the Board did not mean to approve or disapprove any "monopolization" of the TWA market by Toolco represented by those transactions, or any "boycott" of other "suppliers" of aircraft to TWA inherent in those repeated transactions, and in fact, inherent in Toolco's control over TWA. (332 F.2d, at 610-11; R. 1425-27) But even an administrative agency must be presumed to intend the natural consequences of its acts. To say that the Board approved all the pieces of the pattern of dealing between Toolco and TWA, but not the pattern itself, is to assert an absurdity. Moreover, in the two plenary proceedings held by the Board, notably in the *Further Control* case, Toolco's general pattern of dealing with TWA was in fact considered in perspective.

Further, the scope of the exemption granted by the transactional orders must clearly be construed not solely in terms of the transactions themselves, but by the total context in which they were considered by the Board. This context certainly included the record of the prior orders in the same proceeding, and other information regarding Toolco and TWA on file with the Board.

There was an extensive mass of such information in the Board's files relating to the Toolco-TWA relationship, even apart from the records in the continuing control proceedings. The Board maintains continuing surveillance over the airlines. Its files are replete with information concerning the operations of carriers and the decisions and actions of their management. Under FAA § 407(a), the Board "is empowered to require annual, monthly, periodical, and special reports from any air carrier . . . and to require from any air carrier

specific answers to all questions upon which the Board may deem information to be necessary." And § 407(e) provides that "the Board shall at all times have access to all lands, buildings, and equipment of any carrier and to all accounts, records, and memoranda . . . kept or required to be kept by air carriers."

Pursuant to its sweeping statutory authority, the Board has promulgated elaborate reporting regulations. 14 C.F.R. §§ 200 *et seq.* Especially significant are the reports required from carriers on financial and operating statistics. 14 C.F.R., Parts 221, 235, 241, 245, 248, 261, 299.[3]

Further, the Board had available to it the information disclosed by its periodic field audits and investiga-

[3] CAB Form 41 requires regular reports on a great number of items covering every facet of an air carrier's operations and management. These reports disclose, *inter alia*, each acquisition of an airframe and aircraft engine, including such information as (i) date of acquisition, (ii) from whom acquired, (iii) date placed in service, (iv) cost, (v) reserves for depreciation, (vi) type, model and cabin design. Similar information must be disclosed as to flight equipment acquired by lease of more than 90 days. (Schedule B-7.) In addition, each carrier must report with respect to: flight equipment on order and available through continuing lease arrangements, including data with respect to the amount and costs of equipment on order and the amount and rental costs of leased equipment (Schedule B-2); past and current deployment of flight equipment (Schedule T-3 and Schedules and Tariffs filed with the Board); operations conducted with type of flight equipment (Schedules T-3 and T-4, CAB Forms 2788 and 2789); and traffic carried by each type of flight equipment (CAB Form 41, Schedule T-3, and CAB Forms 2788 and 2789). Other reports give inventories of flight equipment parts (Schedule B-9), airframes and engines (Schedule B-43), and accounts of "transactions with associated companies." (Schedule B-44) These reports thus informed the Board of the extent to which TWA was acquiring aircraft and engines from Tooleo and the extent to which they were obtained directly from the manufacturers. They gave a full picture of TWA's activities with respect to acquisitions of aircraft during the period of the complaint.

tive inquiries of TWA,[4] the information given it by TWA in each successive application by TWA for modification of the original control order, and the special annual reports by TWA of transactions involving TWA and Toolco, in compliance with the requirements imposed in the 1944 and 1950 control orders.

The CAB also had before it the voluminous records compiled in the course of route proceedings and other cases, such as subsidy and rate-making matters. In route cases the Board inquires into the fitness and capabilities of airlines, their equipment needs and the availability of equipment, and their capital requirements. TWA was involved in a number of major route cases during the period covered by the complaint. See, *e. g., Great Lakes-Southeast Service Case,* 27 C.A.B. 829 (1958); *Saint Louis-Southeast Service Case,* 27 C.A.B. 342 (1958); *West Coast-Europe Case,* 25 C.A.B. 180 (1957); *Southern Transcontinental Service Case,* 33 C.A.B. 701 (1961); *New York-San Francisco Non-*

[4] The following field audits have been performed on TWA from 1945 to date by the Staff of the Board:

Period of Audit Coverage	Dates of Audit
Jan. 1, 1945 – June 30, 1946	1946
Jan. 1, 1946 – Dec. 31, 1947	1948
Jan. 1, 1948 – Dec. 31, 1949	1950
Jan. 1, 1950 – Dec. 31, 1951	1952
Jan. 1, 1952 – Dec. 31, 1953	1954
Jan. 1, 1954 – June 30, 1958	Sep. 25, 1958 – Feb. 13, 1959
July 1, 1958 – Dec. 31, 1959	Jan. 11, 1960 – Apr. 2, 1960
Jan. 1, 1960 – Dec. 31, 1960	Apr. 1, 1961 – June 7, 1961
Jan. 1, 1961 – June 30, 1962	Oct. 26, 1962 – Dec. 20, 1962
July 1, 1962 – June 30, 1963	Dec. 10, 1963 – Mar. 13, 1964
July 1, 1963 – June 30, 1964	Oct. 12, 1964 –

Source: Field Audits Div., Office of Carrier Accounts and Statistics, CAB.

stop Service Case, 29 C.A.B. 811 (1959). In the *Southern Transcontinental Service Case,* 33 C.A.B. 701 (1961), the Initial Decision of the Hearing Examiner, as adopted by the Board, shows thorough familiarity with TWA's jet equipment and financing problems and programs.[5]

In rate cases, the Board engages in comprehensive consideration of equipment costs and requirements and sources of financing and equipment requirements. TWA was involved in an extensive rate investigation

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[5] The Board in this case, for example, received an explanation from TWA's Senior Vice President E. O. Cocke of the transaction whereby Toolco made available to Pan American World Airways six Boeing 707's originally ordered for TWA. Cocke explained that the six planes would not be needed by TWA. Dkt. 7984, pp. 11177-83; see f. 16954, 16963-64, 16978-79. This alleged "diversion" of jet aircraft was one of the "offenses" charged in the complaint. (Para. 18; A-13).

The Examiner's Report—adopted by the Board—said:

"As one of the country's largest transcontinental carriers, with many years of experience in serving and developing long-haul markets of the type involved herein, TWA is certainly well qualified to operate the proposed southern transcontinental route. This carrier has long been a pioneer with new types of aircraft and innovations of service techniques. At present, TWA is one of the world's leading operators of pure jet equipment. As of this writing, February 1960, the carrier has in operation on its domestic system a total of 15 Boeing 707 transports, a greater number than are being operated by any other domestic carrier, save American. Deliveries on 12 long-range models of Boeing jet have begun and service with this type of aircraft was inaugurated at the end of 1959 over TWA's international routes. Moreover, the carrier expects to begin to receive delivery soon on a fleet of Convair 880 pure jet aircraft. While the exact number of these aircraft to be acquired by TWA has not yet been determined, the carrier is planning on the use of about 20 or 30 of such planes. Service with this latter type of aircraft on TWA's domestic system was scheduled to begin in the spring of this year. With 15 Boeing 707 aircraft and 20 Convair 880's TWA would be one of the largest domestic operators of pure jet aircraft during 1960." (33 C.A.B., at 853).

in *General Passenger-Fare Investigation*, 32 C.A.B. 291 (1960). The Board's opinion showed full awareness of TWA equipment and financing history and needs.[6] TWA submitted a detailed projection of its flight equipment program from 1958 through 1962. (32 C.A.B., at 423). The Board was also provided with a projection of financing requirements, indicating the net cash funds available for the TWA flight equipment acquisition program and the additional financing required. (*Id.*, at 425). The Board was fully aware that TWA's financing "represents a special situation since the necessary financing will be arranged by Hughes Tool Co." (*Id.*, at 425; see also *id.*, at 299 n. 21; 364).

On the basis of the mass of data available to it from the multiple sources touched on above, a realistic consideration of the powers and functions of the CAB compels the conclusion that the Board acted with complete awareness of the implications and consequences of its orders. The Board, when it approved these transactions, was fully advised both as to the control power Toolco held over TWA, as well as all of TWA's prior aircraft acquisitions involving Toolco. The

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[6] Evidence relating directly to Toolco's exercise of its control relationship with TWA was presented to the CAB in the § 408 proceeding involving the acquisition of control over Northeast Airlines by Toolco. In affirming the Board's decision approving acquisition of control, the Court of Appeals for the District of Columbia Circuit pointed out that

> "The record is replete with evidence of the willingness of the examiner to inquire into the character of the management of TWA by Toolco. He permitted testimony whether there was improper dealing between TWA and Toolco, whether there was conflict of interest between them, as well as other matters having to do with the good faith of Toolco in its dealings with TWA." *National Airlines, Inc.* v. *CAB*, 321 F. 2d 380, 384 (D.C. Cir. 1963).

Board knew that TWA had for many years acquired a substantial part of its aircraft through Toolco or with the assistance of Toolco, and had approved these transactions notwithstanding that fact. The Board's approval of such a consistent practice must plainly be construed as an approval of the pattern of Toolco's involvement in TWA's aircraft acquisitions.

B. It is suggested that the Board did not know of some unidentified "backdrop" to the dealings between Toolco and TWA, or was kept uninformed as to certain unspecified "conditions" on these transactions. (332 F. 2d, at 610; R. 1426) But even if it be assumed that the Board's approvals did not take into account all of the generalities alleged in the complaint, the result is the same: the District Court had no jurisdiction. The orders of approval stand, exempting the transactions in question under the control relationship unless and until "modified or suspended." The statute vests the power to modify or suspend these orders in the Board, not in the courts. If—despite the enormous amount of "backdrop" available to the Board outlined above—the Board (if the allegations of the complaint are accepted) was not apprised of some "backdrop" to the transactions it approved, the result would not be that the courts have jurisdiction, but that a party in interest might submit a petition to the Board to modify or suspend its prior orders.

C. Moreover, if it is considered that some of the allegations of the complaint may possibly go to matters not before the Board, it still would not follow that the District Court had jurisdiction here. It is clear beyond cavil that the "dominant facts"[7]—the basic, op-

[7] *United States Navigation Co.* v. *Cunard S.S. Co.*, 284 U.S. 474, 483 (1932).

erative facts on which the central thrust of the lender-management complaint depends—were before the Board. Any other matters possibly raised by the complaint were completely "interrelated" with matters either taken in hand by the Board, or matters subject to the Board's powers, and accordingly must be similarly treated. See *United States Navigation Co.* v. *Cunard S.S. Co.*, 284 U.S. 474, 485 (1932).

The Board's scrutiny over the relationship between TWA and Toolco was so pervasive that it should be held that any possible question as to the scope of the antitrust exemptions afforded by the various Board orders in the continuing FAA § 408(b) proceeding should be a matter for the Board to resolve, at least in the first instance. See *United States* v. *Railway Express Agency, Inc.*, 89 F. Supp. 981, 987 (D. Del. 1950); *American Union Transport* v. *River Plate & Brazil Conferences*, 126 F. Supp. 91 (S.D.N.Y. 1954), *aff'd*, 222 F. 2d 369 (2d Cir. 1955); *Apgar Travel Agency* v. *International Air Transport Ass'n.*, 107 F. Supp. 706 (S.D. N.Y. 1952); *S.S.W., Inc.* v. *Air Transport Ass'n*, 191 F. 2d 658, 664 (D.C. Cir. 1951), *cert. denied*, 343 U.S. 955 (1952). Otherwise a construction of the exemptions by the courts, more narrow than that intended by the Board, would bring about the collision of the "two regimes" of which this Court warned in *Panagra*. See 371 U.S., at 310.

In such a review of the scope of its existing orders, the Board also would have the power—inherent in the regulatory scheme—to see whether they should be modified, or additional orders entered.

D. Finally, there appears to be some suggestion that because the imposition of the Voting Trust on TWA by the lenders ousted the previous management which

had been nominated by Toolco, there is no need to hold that the matters embraced by the complaint lie within the jurisdiction of the Board, rather than that of the courts, at this juncture. (Br. in Opp. 13-14). The basis for such a suggestion is apparently that, with the imposition of the Voting Trust, the Board has no further power to regulate the relationship between TWA and Toolco.

This suggestion is without substance for two reasons. First, the exemption provided by FAA § 414 which ensued upon the various Board orders touching every aspect of the control relationship between Toolco and TWA here, is not lost even if control were later terminated. On the face of the statute, that exemption is an unqualified and permanent one. The statutory provision reflects the fact that the control relationship and its incidents are subject not directly to the antitrust laws as such but to the regulatory regime of the Board. Since this is the case, and in view of the unqualified language of § 414, there is no more reason directly to apply the antitrust laws retroactively to the control relationship than there is to apply them prospectively.

Secondly, the factual premise of the suggestion is erroneous. Although Toolco's shares in TWA are subject to a Voting Trust, Toolco remains the beneficial owner of 78 per cent of the stock of TWA. The Voting Trust agreement is terminable after ten years or earlier if the indebtedness it relates to is retired. The Board has viewed the control relationship between Toolco and TWA as a continuing one, despite the "temporary hiatus" imposed by the Voting Trust. See *Hughes Tool Company*, Dkt. 1182, C.A.B., Order E-21057, July 10, 1964, p. 5, *reversed on other grounds*

sub nom. Trans World Airlines, Inc. v. *CAB,* 2d Cir., No. 29063, Dec. 7, 1964, petitions for rehearing pending.[8]

Toolco is, as appears from the decisions just cited, taking steps looking toward the termination of the Voting Trust and the resumption of full control by it over TWA. Thus, not only has the Board recognized that Toolco still stands in such a relationship to TWA as to give it continuing jurisdiction, but there is presently contemplated a series of events, under which, subject to the favorable determination of the Board on remand from the decision of the Court of Appeals, Toolco may regain full control of TWA. To further underscore the continuing nature of the supervision by the Board over Toolco's control relationship with TWA, the Court of Appeals has specifically instructed the Board, in the plenary hearing the Court has ordered the Board to hold under § 408 with respect to Toolco's proposal to terminate the Voting Trust, to conduct an exploration of the charges made against Toolco in the

[8] In this proceeding, Toolco, proposing to acquire (at a stipulated 16½ per cent premium) TWA's notes from the lenders, moved the Board for a declaration that the Board would have no jurisdiction over the termination of the Voting Trust that would follow upon the acquisition of the notes by Toolco. The Board held that it had jurisdiction under § 408, but that, in view of the earlier plenary control cases, and Toolco's continuing stock ownership in TWA, it would require, in connection with the termination of the Voting Trust, not a plenary hearing, but rather a summary proceeding based on consideration of a plan to be submitted by Toolco to divest itself of control over Northeast Airlines. The Court of Appeals, on TWA's petition for review, reversed, holding that it was an abuse of discretion not to have ordered a plenary hearing on the termination of the Voting Trust in the light of the allegations made against Toolco in the antitrust complaint in this case. The Court ignored a suggestion by TWA that it order the Board not to take any action respecting the termination of the Voting Trust until the conclusion of the judicial proceedings in the instant case.

antitrust complaint filed in this action![9] This latter action by the Court of Appeals—contrary to the view that court expressed in the instant case—bears practical witness to the fact that the proper forum for the exploration of the issues raised in the complaint in this matter is the Board.

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[9] The Board has protested the collision of regimes which the Court of Appeals' decision creates, in turning the *Panagra* case on its head and requiring the Board to take into account the proceedings had upon the private "antitrust" complaint involved in this case:

> ". . . The fact that the antitrust complaint contains charges which stand undenied . . . should not, of itself, serve to require the Board to embark upon protracted proceedings. The Board maintains continuing surveillance over the airlines, and has a great deal of information in its public files concerning the day-to-day operations of the carriers, and the decisions and actions of their management. Such information is obtained in a variety of methods. Recurring reports are required of the airlines, and their management decisions concerning equipment selection, financing, and the like are the subject of scrutiny in formal Board proceedings involving matters such as new route applications and control applications. Thus, the matters alleged in the antitrust complaint were the subject of staff inquiry in relation to the Board's approval of control of Northeast by Toolco, and, as noted by the Court of Appeals for the District of Columbia Circuit, no evidence was adduced in the Board's proceeding showing any illegal action by Toolco in connection with its control of TWA notwithstanding that any person was at liberty to attempt such a showing. Surely the Court should at least consider any findings which the Board might make in determining not to hold further hearings before it concludes, upon the basis of the limited information available to the Court, that an abuse of discretion has resulted." Board's Petition for Rehearing, pp. 5-6, *Trans World Airlines, Inc.* v. *CAB*, 2d Cir., No. 29063.

III. THE DETAILS OF THE RELIEF DEMANDED BY THE COMPLAINT DO NOT PRESENTLY AFFORD THE DISTRICT COURT JURISDICTION IN THIS MATTER.

It is suggested by the Court of Appeals (332 F. 2d, at 609; R. 1424) and respondent (Br. in Opp. 14, 15) that certain aspects of the relief demanded in the complaint preclude a holding that the matters in issue herein are at this juncture wholly within the jurisdiction of the Board. The complaint in this matter filed by the lender-management of TWA demanded divestiture of Toolco's controlling block of stock in TWA, and treble damages.

1. As to the question of divestiture, extended discussion is not necessary. For—even assuming that availability of remedy is the issue—this remedy could be supplied by the Board, either through suspension of the orders permitting assumption of control by Toolco under Section 408, or in a proceeding under Section 411 of the Act, as we have shown.

Indeed, the prayer for divestiture underscores the dangers of a collision between court and administrative agency. The Board specifically sanctioned Toolco's acquisition of its stock interests in TWA; its power to grant such approval cannot be challenged. A divestiture order in a judicial proceeding would be totally inconsistent with the Board's determination that the acquisition of the TWA stock was and is in the public interest.

2. The prayer for treble damages hardly poses a more difficult question. (a) In the *Panagra* case, this Court held that, even absent orders of approval under FAA § 414, a government antitrust complaint could not be maintained. On the basis of the principles which the Court articulated in the *Panagra* case, and their *a fortiori* applicability to this case as we have

set forth in Part I, the *substantive* provisions of the antitrust laws have been superseded, as far as the relationship between Toolco and TWA is concerned, by the Board's powers under the Act. It would be incongruous to hold that a matter as to which the antitrust laws were superseded by the Act, thereby preventing a suit in equity in the public interest by the United States, could nonetheless furnish the basis for an action for treble damages brought by a private party.

At the very least, under these circumstances—even if we put to one side the effect of all the exemptive orders actually entered by the Board—the procedure set forth by this Court in the *Panagra* case should be followed (371 U.S., at 313 n. 19):

> "If it were clear that there was a remedy in this civil antitrust suit that was not available in a § 411 proceeding before the C.A.B., we would have the kind of problem presented in Hewitt-Robins, Inc. v. Eastern Freight-Ways, Inc., 371 U.S. 84, where litigation is held by a court until the basic facts and findings are first determined by the administrative agency, so that the judicial remedy, not available in the other proceeding, can be granted."[1]

Moreover, these words were spoken only in the context of a remedy under FAA § 411 where there was not

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[1] In a recent treble damage action, a district court rejected the contention that the inability of the Board to award money damages is a basis for refusing to recognize the Board's primary jurisdiction. *Allied Air Freight, Inc.* v. *Pan American World Airways, Inc.*, 5 C.C.H. Trade Reg. Rep. ¶ 71,128 (S.D.N.Y. 1964). The court pointed out that "referral to the agency . . . [is] made, not for remedial purposes, but to insure uniformity of regulation where specialized experience and expert competence . . . [are] necessary because of the presence of problems affecting the industry." (*Id.*, at pp. 79,462-63)

involved the Board's power of exemption under FAA § 414. When the factor is added—as it is here—that the Board might exempt the transactions in question, upon a review of them, it follows that not only should the court merely suspend proceedings until the "basic facts and findings" are made by the administrative agency, but that it should not even entertain the suit until there is forthcoming a determination by the Board of the scope of its existing exemptive orders, or of whether a further order under FAA § 408(b) should be entered, having the exemptive consequences set forth in FAA § 414.

Because of this added factor, it would clearly appear that dismissal of the complaint, rather than holding the case on the docket of the District Court, would be in order. The device of holding the case on the court's docket is appropriate in a case of simple "primary jurisdiction" where there is no question of the supersession of the antitrust laws by an administrative regime, or of the presence of an administrative exemptive power, and where all that is desired through a "primary jurisdiction" reference is to obtain the expert assistance of the administrative agency as to matters presently within the court's jurisdiction. See McGovern, Types of Questions Over Which Administrative Agencies Do Not Have Primary Jurisdiction, 13 ABA Antitrust Law Proc. 57, 62-64 (1958). But where there is a supersession of the antitrust laws, or where there exists an issue as to whether an exemptive power has been or should be exercised, the cases teach that the proper disposition is dismissal. See *Panagra*, 371 U.S., at 313 n. 19; *Far East Conference* v. *United States*, 342 U.S. 570, 576-77 (1952); *United States Navigation Co.* v. *Cunard S.S. Co.*, 284 U.S. 474 (1932). This is because the substantive cause of action has not

matured until the agency has acted. Only after the Board had particularly considered the matters in question (see *Cunard, supra,* at 487-88), and had determined not to enter an FAA § 408(b) order touching the transactions complained of, could an action in the District Court seeking the judicial remedy of treble damages be maintained.

(b) Moreover, returning from hypothesis to fact: when the nineteen orders of the Board under FAA § 408—each of which has the exemptive effect specified by FAA § 414, as we have shown in Part II hereof—are considered, it is perfectly clear that the present action may not be maintained, even though it seeks treble damages. FAA § 414 states flatly that the persons affected by the orders specified shall be "relieved from the operations of the antitrust laws"; no reservation of a right to sue for damages is made. The approach of Congress was not simply to free the parties from injunctive interference,[2] or the brunt of other equitable remedies as to the transaction in question. Rather the statute is written—and should be construed as—a substantive provision removing any basis of illegality under the antitrust laws from the transactions in question. It would, of course, be a strange doctrine that would hold that a transaction which by FAA § 414 is exempted "from the operations of the antitrust laws" could nonetheless be the basis for a suit for treble damages under those laws. If there is any question as to the scope of the exemptive orders, it is for administrative resolution before the damage action may be maintained. See *United States Navigation Co.* v. *Cunard S. S. Co., supra,* at 487-88. The authorities we have just cited, to the effect that dis-

[2] Contrast *Richmond Screw Anchor Co.* v. *United States*, 275 U.S. 331 (1928); 28 U.S.C. § 1498.

missal is the proper action where a case of supersession of, or possible exemption from, the antitrust laws is presented, apply with greater force where exemptive orders have actually been entered and the only question is as to their scope.[3]

[3] Should, however, this Court conclude that the proper disposition of the cause was not dismissal but the holding of the case on the District Court's Docket pending a plenary reference to the Board, we would urge this Court, in the exercise of its supervisory powers over the administration of justice in the Federal Courts and the maintenance of the proper relationships between the judicial and administrative systems (see *United States* v. *Philadelphia Nat'l Bank*, *supra*, 374 U.S., at 350 n. 26; *Far East Conference* v. *United States*, *supra*, 342 U.S. at 574-75) to order a remand of the case to the District Court with instructions to vacate the default judgment and to stay all further proceedings in the matter until the conclusion of appropriate proceedings before the Board. While it could be argued that the sole question for appellate review in this case at the present juncture is the naked question of the District Court's "jurisdiction," the Court of Appeals did not appear to take so narrow a view of the questions before it, and dealt generally with the effect of the existence of the administrative regime of the Board upon the issues in the law suit.

The cases we have just cited teach that this Court will follow extraordinary procedures—such as the grant of common law writs of certiorari to the District Courts and consideration *sua sponte* of matters abandoned by the parties—in order to resolve questions relating to the proper relationship between the courts and the administrative agencies in the administration of the antitrust laws. If this Court should determine that while the District Court technically had "jurisdiction" over the complaint, a complete stay of its proceedings pending reference to the Board was mandatory, such a ruling would obviously be completely at variance with the holding of the District Court of which petitioner sought review by taking the position which resulted in the default judgment. It would, accordingly, be grossly inequitable to permit the default judgment to stand under those circumstances. Moreover, permitting the judgment to stand would in itself bring about a collision between the Board's regime and the court's authority. See, *e. g.*, the recent holding of the Court of Appeals in *Trans World Airlines, Inc.* v. *CAB*, 2d Cir., No. 29063, December 7, 1964, holding that the default judgment in this matter should be considered by the Board in proceedings before it in connection with the proposed termination of the Voting Trust. See pp. 82-83, and n. 9, p. 83, *supra*.

IV. THE COMPLAINT FAILS TO STATE A CLAIM UNDER THE ANTITRUST LAWS.

"The conclusions were that rather than to become involved in the details of an equity action involving possibly multiple assertions of wrong doing, which would involve considerably more factual investigation and determination of detail which they [TWA's lawyers] had not had an opportunity to pursue, they felt that they very likely would recommend to TWA the institution of an antitrust action, based upon the fact that Mr. Hughes had preempted to himself the procurement of planes and the financing of TWA's operations."

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"Mr. Sonnett [one of TWA's attorneys] observed, as he had once before, or at least once before, I guess several times before, that the relief that would be obtainable in an antitrust action would in fact, make TWA whole for any damages that it had suffered, and that the best people were defendants in antitrust actions, and that he felt that one of the reasons for bringing an antitrust action was that it didn't have the social appropriums [sic] attached to it that some other types of action did . . . ." Charles C. Tillinghast, Jr., lender-management installed president of TWA, explaining on deposition how the present complaint came to be brought as an antitrust action. (A-343-44, 461.)

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Petitioners submit that the complaint should have been dismissed for failure to state a claim under the antitrust laws.[1] For purposes of argument on this

[1] The Court of Appeals interpreted its order limiting the issues on interlocutory appeal to it—which order spoke in terms of the "jurisdiction" of the District Court—as broad enough to cover the issue whether the complaint stated a cause of action. After discussion, it stated: "We are satisfied that the complaint sufficiently states a cause of action and establishes the district court's jurisdiction." 332 F. 2d, at 611 (R. 1428) Certainly the issues in this Court are at least as broad as those considered by the Court of Appeals.

point; we make but one assumption, which is incontestable: The acquisition of control of TWA by Toolco —specifically sanctioned by the Board and never revoked—is itself immune from attack under § 7 of the Clayton Act, by reason both of FAA § 414 and the last sentence of § 7 itself.[2]—We put to one side in this Part the arguments we have made in Parts I, II, and III, *supra*, in which we have shown that the complaint in this matter could not be maintained because the District Court's jurisdiction was superseded by the Federal Aviation Act, and because orders of the Board immunized defendants with respect to the acts alleged in the complaint.[3]

In essence, the complaint charges that the defendants violated the antitrust laws in connection with

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[2] The Board has, of course, express power over control acquisitions under FAA §§ 408 and 414, which provides the necessary complement to the last sentence of § 7. Contrast *Maryland & Virginia Milk Producers' Ass'n* v. *United States*, 362 U.S. 458, 467-68 (1960).

[3] We argue this Part IV on a hypothetical basis in order to demonstrate that, even under the restrictive view of the Court of Appeals—which was apparently that only the naked acquisition of control was approved by the Board under § 408 and immunized under § 414—it follows, by reason of the structure of the antitrust laws (and for other reasons which we develop) that the complaint does not state a cause of action. In point of fact, as we have demonstrated there were numerous transactional orders of the Board which specifically immunized all the conduct now complained of. Furthermore, for that matter, the orders of the Board permitting the acquisition of control were not unqualified, but were orders which expressly barred Toolco from engaging in transactions with TWA of more than a nominal amount; those orders were, however, amended to approve the details of the exercise of that control, through the transactional orders which had the effect of modifying the original orders and making them applicable to the transactions in question. But on the hypothesis on which this Part is based, we shall assume that all that was entered were orders permitting the acquisition of over 70 per cent control over TWA by Toolco.

Toolco's exercise of control over TWA, specifically with respect to the acquisitions and financing of aircraft by TWA.

The charging paragraph of the complaint (para. 9; A-8-9) alleges that the defendants engaged in the following offenses in violation of the antitrust laws:

1. Toolco acquired the stock of TWA in violation of § 7 of the Clayton Act.

2. Toolco caused TWA to acquire jet aircraft on the condition that it would not acquire aircraft from any competitor of Toolco in violation of § 3 of the Clayton Act.

3. The defendants combined to restrain commerce by effecting a "tie-in," that is, financing TWA's aircraft acquisitions only on the condition that TWA would acquire such aircraft from defendant Toolco, in violation of § 1 of the Sherman Act.

4. The defendants combined to restrain commerce by requiring TWA "to boycott all suppliers of aircraft" except defendant Toolco, in violation of § 1 of the Sherman Act.

5. The defendants combined and conspired and attempted to monopolize "a substantial segment of the interstate and foreign trade and commerce of the United States in violation of Section 2 of the Sherman Act."

Paragraph 8 of the complaint (A-4-8) makes it clear that the "substantial segment" of commerce which is the subject of the alleged violations is merely that segment represented by the requirements of TWA out of all of the aircraft "operated by all scheduled air carriers" in the United States and between the United States and foreign cities. Thus, it is plain that

the "market" defined in the complaint as the subject of the offenses is confined to the market represented only by TWA's aircraft requirements.

1. *The Clayton Act § 7 charges.*—Toolco's acquisition of stock control of TWA was approved by the Board in 1944, and a further acquisition of control was approved in 1950. (6 C.A.B. 153; 12 C.A.B. 192). It was not controverted by the courts below that the approval by the Board had the effect of removing the application of § 7 of the Clayton Act to the acquisition of control. This is true not only by reason of FAA § 414, but in view of the very explicit language of the last sentence of § 7 itself.[4] Accordingly, it follows that that portion of the complaint (para. 9(g); A-9) which charges that the acquisition of the stock by TWA of Toolco violates § 7, does not state a claim within the District Court's jurisdiction.[5]

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[4] "Nothing contained in this section shall apply to transactions duly consummated pursuant to authority given by the Civil Aeronautics Board . . . under any statutory provision vesting such power in such . . . Board."

[5] Although the Court of Appeals did not explicitly state that the complaint did not state a claim under § 7, it did recognize that:

> "The Board is explicitly entrusted with the duty of considering for approval any potential acquisition of control over an air carrier by a person engaged in any phase of aeronautics; and to the extent of such approval—but only to that extent—the Act grants immunity from the operation of the antitrust laws." 332 F. 2d, at 608; (R. 1422)

In disposing of Toolco's counterclaim that "Metropolitan and Equitable had acquired control over TWA, in violation of § 408," the Court of Appeals stated (332 F. 2d, at 613; R. 1432): "[T]he Board clearly possesses exclusive jurisdiction. Under that section [408], the Board is empowered to investigate alleged violations, and the district court was without power to adjudicate this issue."

But in the light of this conclusion—and for other reasons—it is clear that the remainder of the complaint also fails to state a claim under the antitrust laws. While the complaint, in addition to the §7 charge, purports to list in paragraph 9 seven separate violations, it is clear that many of them are repetitive. Thus, the court below referred to only three (332 F. 2d, at 608; R. 1422-23):

> "an attempt to monopolize a substantial segment of interstate and foreign air commerce, imposition by the defendants on TWA of the condition that the airline not purchase or lease aircraft from any supplier other than Toolco, and the tying of financing of aircraft acquisitions with the purchase of such aircraft from Toolco." (See also 332 F. 2d, at 611; R-1427)

2. *The Sherman Act § 2 Charges.*—As we pointed out above—and the point bears emphasis—the "substantial segment of interstate and foreign air commerce" referred to by the court and alleged in the complaint is solely that segment represented by TWA's requirements for aircraft. Thus, the allegation of an attempt to monopolize that "substantial segment" alleges no more than that Toolco arrogated to itself control over TWA's requirements for aircraft.

(a) As the Board stated, from 1950 until the Voting Trust, "the directors of Toolco [were] free to enforce their dictates or those of Toolco's controlling shareholder on TWA." (Order E-16195; A-222) In fact, it is one of the axiomatic assumptions of antitrust merger law that a supplier will dominate that segment of the "market" represented by a subsidiary which it is acquiring. As this Court recognized in *United States* v. *Columbia Steel Co.*, 334 U.S. 495,

523 (1948): "A subsidiary will in all probability deal only with its parent for goods the parent can furnish."

It is precisely in recognition of this assumption that § 7 of the Clayton Act is held to condemn the acquisition of a customer or potential customer by a supplier if the proportion of the market represented by the needs of the acquired company is substantial. See *Brown Shoe Co.* v. *United States*, 370 U.S. 294 (1962); *Maryland & Virginia Milk Producers' Ass'n* v. *United States*, 362 U.S. 458 (1960); *United States* v. *E. I. DuPont de Nemours & Co.*, 353 U.S. 586 (1957); *United States* v. *Jerrold Electronics Corp.*, 187 F. Supp. 545 (E.D. Pa. 1960), *aff'd per curiam*, 365 U.S. 567 (1961); *A. G. Spalding & Bros., Inc.* v. *Federal Trade Commission*, 301 F. 2d 585, 620-28 (3d Cir. 1962); *Crown Zellerbach Corp.* v. *Federal Trade Commission*, 296 F. 2d 800 (9th Cir. 1961), *cert. denied*, 370 U.S. 937 (1962). Toolco owned 78 per cent of TWA; that acquisition of stock control was approved by the Board, and hence immune from attack under § 7. It accordingly turns the antitrust laws on their head to say that the exercise of control by TWA of Toolco could constitute an unlawful attempt to monopolize under § 2 of the Sherman Act. It is hornbook law that § 7 was passed to arrest monopolistic tendencies in their incipiency before they amount to a violation of the Sherman Act. *United States* v. *E. I. DuPont de Nemours & Co.*, 353 U.S. 586, 589, 597 (1957); *Brown Shoe Co.* v. *United States*, 370 U.S. 294, 318 n. 32 (1962); H. R. Rep. No. 1191, 81st Cong., 1st Sess. (1949), p. 8; S. Rep. No. 1775, 81st Cong., 2d Sess. (1950), pp. 4-5. Even if Toolco were an aircraft manufacturer, it could hardly be argued that an act which does not violate Clayton Act § 7—acquisition of a controlling interest in a car-

rier by an aircraft supplier—could amount to a violation of Sherman Act § 2,[6] because, in the exercise of that control, Toolco monopolized TWA's aircraft purchases.

(b) Moreover, it must be remembered that Toolco was never a manufacturer of aircraft usable by TWA, and the complaint does not allege that it has conspired in any way with an aircraft manufacturer. The most that can be said for the allegations of the complaint is that actual manufacturers of aircraft were prevented from selling their planes to TWA directly, but rather had to deal with it through its parent, Toolco. For a parent corporation to order aircraft for use by its subsidiary rather than have the subsidiary place the orders itself does not foreclose aircraft manufacturers from the "market" represented by TWA's aircraft requirements, and cannot form the basis of a charge of attempted monopolization of that "market."

3. *The Clayton Act § 3 Charges.*—The charges of violation of § 3 of the Clayton Act suffer from the same two infirmities. The alleged violations of § 3 which are pleaded lie in an alleged imposition of conditions by Toolco upon its supplying of aircraft to TWA, to the effect that TWA would not buy or lease aircraft from other persons. Fundamentally, these charges amount to a reiteration of the charge that Toolco foreclosed its subsidiary TWA from dealing directly with aircraft manufacturers. As we have indicated above, as to the Sherman Act § 2 charges, even if Toolco were an aircraft manufacturer, the Board's orders permitting the assumption of control

[6] The proof required to make out a violation of § 2 is more substantial than that required to show a violation of § 7. Cf. *Tampa Elec. Co.* v. *Nashville Coal Co.*, 365 U.S. 320, 335 (1961); *Brown Shoe Co.* v. *United States*, 370 U.S. 294, 318 n. 32 (1962).

would have foreclosed any charge of a violation of § 3 through the exercise of control as well. Moreover, it is not apparent how Toolco's presence as TWA's parent operated to "lessen competition" in or tended to "create a monopoly" of the manufacture of aircraft for TWA. Toolco was not a manufacturer of aircraft of the sort needed by TWA and did not compete with any aircraft manufacturers in the production of aircraft for ultimate use by TWA.

4. *The Sherman Act § 1 Charges.*—Neither do the charges of violation of Section 1 of the Sherman Act state a cause of action, particularly in light of the indisputable exemption granted to Toolco's acquisition of TWA's stock. One of the § 1 charges—the tie-in charge—is obviously subject to the same infirmities as the charge under § 3 of the Clayton Act.[7] Regard-

[7] A further allegation in the complaint of a Sherman Act conspiracy, involving the Atlas Corporation, is frivolous and was ignored by the Court of Appeals in its statement of the possible antitrust violations, and by the District Court. Atlas Corporation was named as a co-conspirator in the complaint, but not as a defendant. It is alleged to have controlled Northeast Airlines. The only acts "in furtherance of the offenses" charged in the complaint in which Atlas is said to have engaged relate to the proposed TWA-Northeast merger. Thus, Atlas is alleged, prior to May 1960, to "have agreed to cause Northeast to submit to TWA a proposed agreement of merger upon terms advantageous to the defendants and Atlas and disadvantageous to TWA." (Complaint, para. 21; A-13-14) Between May 1961 and the filing of the complaint, Atlas is alleged, together with the other defendants, to "have demanded that TWA accept the proposed merger with Northeast on the terms previously directed by the defendants. . . ." (Complaint, para. 47; A-21) These allegations concern a matter clearly subject to the superseding regulatory regime of the Board, since only a Board order could approve such a merger. See FAA § 408(a)(1).

It must be noted that the parties named defendants—Toolco, its sole stockholder, Hughes, and Toolco's chief operating officer,

less of the technique or method charged, the point of the charge is still only that Toolco attempted to restrain or monopolize the "market" represented by TWA, its subsidiary. This charge would have been foreclosed by the Board's order permitting the acquisition of TWA by Toolco, even if Toolco were a manufacturer of aircraft suitable for TWA's needs—which, in fact, it was not.

The remaining § 1 charge is likewise infirm. This is the charge that the defendants combined to restrain commerce "by requiring plaintiff to boycott all suppliers of aircraft, including jet-powered aircraft, except defendant Toolco." This charge—so typical of the complaint—is an epithetical use of words having an antitrust connotation in a complaint whose real factual thrust is a charge of corporate mismanagement by a dominant stockholder. On the basis of the facts alleged, it is clear that when the complaint says "boycott" it does not mean "boycott" as that term is used in antitrust cases. Thus, it is not charged that either TWA or Toolco made any agreement with any of their competitors or suppliers not to deal with a particular party. Contrast with the present case *Klor's, Inc.*, v. *Broadway-Hale Stores, Inc.*, 359 U.S. 207 (1959), and *Fashion Originators' Guild* v. *Federal Trade Commission*, 312 U.S. 457 (1941). The charge is simply that Toolco and other persons acting for it required TWA, a subsidiary of Toolco, not to acquire air-

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Holliday—could not be adjudged liable of an antitrust conspiracy because a conspiracy in restraint of trade cannot consist of joint action solely between a corporation and officers acting in its behalf. *Nelson Radio & Supply Co.* v. *Motorola*, 200 F. 2d 911 (5th Cir. 1952), *cert. denied*, 345 U.S. 925 (1953); and see *Report of the Attorney General's National Committee to Study the Antitrust Laws* (1955), pp. 30-36.

craft except through Toolco. Clearly, this is not a boycott violating § 1 of the Sherman Act. No court has ever held illegal the selection by a parent of those persons with whom its subsidiaries may deal. *Cf. Report of the Attorney General's National Committee to Study the Antitrust Laws* (1955), p. 35.

The absurdity of the Sherman Act "boycott" charge is fully exposed when it is remembered that it is TWA, the corporation which, engaged in the alleged boycott, that seeks damages caused it by *its* boycotting of suppliers of aircraft. If A coerces B to boycott C, B has no claims under the antitrust laws for damages against A on account of the boycott although he may have a common law claim for malicious injury. The only person with a valid claim for antitrust damages for boycotting is the person boycotted—C.

The complaint, read as a whole, alleges but a single course of conduct. That course of conduct, stated most briefly, is that Toolco acquired control of TWA by purchasing 78 per cent of its voting capital stock and then proceeded to exercise the powers which control gave it. We have already shown that the acquisition of control itself cannot violate § 7 of the Clayton Act because the acquisition was approved by the Board. We submit that to hold that what is immune from attack under § 7 of the Clayton Act can be attacked under the Sherman Act would result in making a mockery of our antitrust laws. In the first place, it renders inoperative the last sentence in § 7, for what does it avail the Board, after careful investigation, to approve an acquisition of control if that approval can be attacked the next day under another section of the antitrust

laws? In the second place, if this complaint were to be upheld, it would amount to a holding that while it was lawful under § 7 for Toolco to acquire the power to foreclose all other manufacturers from access to the market represented by TWA's aircraft requirements, it was unlawful for Toolco to do so under the Sherman Act. Finally, when it is considered that Toolco was not a manufacturer of aircraft for TWA, and that the course of dealings between it and its subsidiary could not have foreclosed aircraft manufacturers from producing aircraft for TWA, there is a further basis on which the complaint must be held not to state a claim.

The court below failed to recognize that respondent in its complaint had merely used the special jargon of antitrust—"boycott," "tying arrangement," "attempt to monopolize"—to describe a relationship between a parent and its 78 per cent owned subsidiary. It overlooked the fact that the parent, since it was not a manufacturer of aircraft for its subsidiary's needs, was not in any position to foreclose, in the antitrust sense, those who manufacture aircraft from producing them for the ultimate use of the subsidiary. And it failed to give proper effect to the decisions of the Board approving acquisition of control of TWA with the accompanying immunization under the antitrust laws.

If the complaint had been framed as a claim for mismanagement by a corporation against its dominant stockholder—which is what the complaint in fact sounds in, despite the forcible imposition on it of a borrowed set of antitrust concepts—it might possibly have properly survived a motion to dismiss. But it would not have stated a federal cause of action, and, since Toolco and TWA are both Delaware corpora-

tions, it could not have been maintained in a federal District Court.[8]

We recognize that the federal courts are loath to dismiss an antitrust complaint *in limine*. (*Poller* v. *Columbia Broadcasting System*, 368 U.S. 464 (1962); *United States* v. *Diebold, Inc.*, 369 U.S. 654 (1962)). But not every complaint which painfully labels itself an antitrust complaint is one. The nationwide discovery processes of the federal courts are doubtless attractive to the plaintiffs in a suit by a new corporate management against an old for mismanagement. But access to the federal courts should not be permitted simply on the basis of a pleader's verbal skill in larding the charges of mismanagement with the vocabulary of antitrust. The *Poller* doctrine insures that the litigant who makes allegations of a genuine commerical restraint of trade will be entitled to offer his proof of them. It does not sanction the abuse of the processes of the federal courts that would result if salt-

[8] In fact, one of the claims for relief in the complaint (paras. 65-70; A-27-28) is frankly a state-created cause of action for corporate mismanagement, which is said to be within the jurisdiction of the District Court on the basis of the theory of "pendent jurisdiction." See *Hurn* v. *Oursler*, 289 U.S. 238 (1933). It is somewhat unusual to think of a claim for corporate mismanagement as being so intricately related to one for the violation of the antitrust laws as to create a "pendent jurisdiction" claim; that the state law claim and the purported "antitrust" claim sound so much alike in this case tells much about the nature of the "antitrust" claim. In any event, since the antitrust claim should be dismissed *in limine*, it would permit the tail to wag the dog if the pendent claim were permitted to go to trial. See *Robinson* v. *Stanley Home Products, Inc.*, 272 F. 2d 601 (1st Cir. 1959); *Dixon* v. *Martin*, 260 F. 2d 809 (5th Cir. 1958); *Strachman* v. *Palmer*, 177 F. 2d 427, 431-34 (1st Cir. 1949) (Magruder, J., concurring); *Massachusetts Universalist Convention* v. *Hildreth & Rogers Co.*, 183 F. 2d 497 (1st Cir. 1950); *State of Georgia* v. *Wenger*, 187 F. 2d 285, 287-88 (7th Cir. 1951), *cert. denied*, 342 U.S. 822 (1951).

ing a complaint, embracing a corporate law quarrel between a lender-management and a prior owner-management, with antitrust jargon sufficed to gain entry to the federal courthouse.

Accordingly, we submit that, even apart from the considerations discussed in Parts I, II and III, the complaint does not state a claim and should have been dismissed.

CONCLUSION

The judgment of the Court of Appeals should be reversed and the cause should be remanded to the District Court with instructions to dismiss the complaint.

Respectfully submitted,

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